

## **RESTRICTIONS ACROSS THE PACIFIC: AUSTRALIA'S INTERNATIONAL AIR SERVICES POLICY AND THE PROBLEMS OF LIBERALISATION**

**David Hodgkinson<sup>1</sup>**

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<sup>1</sup> A principal of The Hodgkinson Group, Aviation Advisors, and formerly Director of Legal Services, IATA. Email address: [d.hodgkinson@hodgkinsongroup.com](mailto:d.hodgkinson@hodgkinsongroup.com). The Hodgkinson Group, based in Australia, has advisors located around the world ([www.hodgkinsongroup.com](http://www.hodgkinsongroup.com)).

## Introduction

In 2006 the Australian government conducted a review of its international air services policy. The main finding of that review was to deny Singapore Airlines its request for access to the Pacific route. The government did 'not envisage Singapore Airlines operating on the route for some years'.<sup>2</sup>

The Australian government has long argued that it liberalises Australia's international air services on a case by case basis and when it is in the national interest to do so. It is argued here that, in deciding as it did with regard to Singapore Airlines and access to the Pacific route, the government confused that interest with the interests of the national carrier. In so arguing, it assesses the economic value and benefits of the liberalisation foregone on the Pacific route. The policy and other background to this decision, as well as the review which led to it, are also examined in detail.

The article seeks to place what is called here the government's 'Pacific decision' within an international air services policy framework in Australia which has been attended by difficulties of process and politics, and which is flawed as a result. It becomes clear that such difficulties, as much as the dilemmas or problems associated with globalisation of markets and industries, account for the government's 2006 decision and the more general problems of inconsistency which have characterised Australia's international air services policy over the last decade.

It should be noted that the virtues of liberalisation, manifest though they may be, are not being argued here. Rather, the article seeks to provide some tentative answers as to why the government - consistent policy statements supporting liberalisation notwithstanding - has not generally been successful in concluding substantive 'open skies' agreements with other countries,<sup>3</sup> using the 2006 Pacific review and decision to illustrate some larger points. It is clear that parts of the world have liberalised around Australia (for instance, the United States, New Zealand and Singapore, each very different markets), and other markets have liberalised ahead of Australia's.

The first part of the article provides a brief introduction to international air services and the increasing liberalisation of international air services agreements. Part 2 examines Australia's international air services policy. Part 3 analyses the Australian government's

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<sup>2</sup> The Hon Warren Truss, Minister for Transport and Regional Services, *Australia to Continue Liberalisation of International Air Services*, Media Release, 22 February 2006 ([http://www.ministers.dotars.gov.au/wtr/releases/2006/February/018WT\\_2006.htm](http://www.ministers.dotars.gov.au/wtr/releases/2006/February/018WT_2006.htm)).

<sup>3</sup> Such lack of success was noted by the New Zealand government in 2000 when it and Australia signed an MOU on open skies and initialled the text of a draft air services agreement and annex (New Zealand Government, *Australia-New Zealand Open Skies Agreement*, Media Backgrounder, 20 November 2000). The Australian government described the agreement at the time as 'effectively the first open skies agreement that we have been able to strike' (Jason Koutsoukis, 'Sky's no limit now with NZ', *The Australian Financial Review*, 17 November 2000). It remains Australia's only one full open skies agreement. See, generally, Richard Webb, *Liberalisation of International Passenger Airline Services*, Research Brief, Parliament of Australia, Department of Parliamentary Services, 24 March 2006, No 14, 2005-06 (Commonwealth of Australia, Canberra, 2006), pp. 7-8.

2005-2006 review of that policy which resulted in Singapore Airlines being denied access to the Pacific route. The fourth part of the article seeks to explain the Government's Pacific decision.

## 1. International air services

State 'permissions' or 'authorisations' - to use the words of the Chicago Convention<sup>4</sup> - in favour of scheduled international air services generally take the form of government-to-government bilateral (and, now, multilateral) air services agreements. Indeed, a standard form bilateral agreement was agreed at the Chicago conference. The Australian Department of Transport and Regional Services (DOTARS)<sup>5</sup> has responsibility for the negotiation and administration of Australia's air services agreements.<sup>6</sup> At present Australia has air services agreements, or arrangements, with over 60 countries.<sup>7</sup>

Although most bilateral air services agreements concluded since the 1944 Chicago conference have followed the standard form agreement agreed at that conference, no two are exactly alike and there have, of course, been a number of variations to the form, for example, bilaterally, the 'Bermuda' agreements concluded by the United Kingdom and the United States. In general, though, air services agreements:

may specify not only the amount of capacity allowed between the two countries but also the frequency of flights, the type of aircraft, the number of airlines which can be designated to fly, routes and airports to be used ... [and] the intermediate and beyond points (and how they may be used).<sup>8</sup>

They also typically contain a provision 'that airlines must be substantially owned by their governments and/or by the citizens of their countries of nationality, and that they must be effectively controlled by those governments and/or citizens'.<sup>9</sup> This is certainly the case for air services agreements concluded by Australia.<sup>10</sup>

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<sup>4</sup> Every country has 'complete and exclusive sovereignty over the airspace above its territory' (Chicago Convention 1944, Article 1). As a result, scheduled international air services may be operated over, into or through the territory of a country only 'with the special permission or other authorization' of that country, and 'in accordance with the terms of such permission or authorization' (Chicago Convention 1944, Article 6).

<sup>5</sup> Aviation generally is the responsibility of DOTARS. It 'provides policy advice to the Ministers ... for the Transport and Regional Services portfolio and delivers a variety of [transport] programs on behalf of the Commonwealth Government' (<http://www.dotars.gov.au/dept/index.aspx>).

<sup>6</sup> [http://www.dotars.gov.au/avnapt/ipb/ias\\_im.aspx#3](http://www.dotars.gov.au/avnapt/ipb/ias_im.aspx#3).

<sup>7</sup> [http://www.dotars.gov.au/avnapt/downloads/register\\_available\\_capacity.pdf](http://www.dotars.gov.au/avnapt/downloads/register_available_capacity.pdf).

<sup>8</sup> Productivity Commission, *International Air Services*, Inquiry Report (Report No. 2) (AusInfo, Canberra, 1998), p. 1.

<sup>9</sup> PPC Haanappel, 'Airline Ownership and Control, and Some Related Matters', (2001) 26 *Air & Space Law*, No 2, p. 90.

<sup>10</sup> It should be noted that, national laws permitting, the ownership and/or control of *domestic* airlines can and do lie with foreign owners (with regard to Australia, no ownership restrictions exist concerning foreign participation in domestic carriers; see note 22). Such airlines, however, given the requirement that airlines be substantially owned by their governments and/or by the citizens of their countries of nationality, and that they must be effectively controlled by those governments and/or citizens, may well have difficulties operating internationally.

Since the mid-1980s air services agreements have increasingly been liberalised, such process referred to over time as one of 'open skies', in which restrictions on the ability of airlines to run international air services are either lessened or removed. Indeed, the effectiveness of bilateral air services agreements became a critical issue, in part because increased demands for international air services revealed shortcomings in the system (both globally and in Australia, leading ultimately in Australia to an inquiry by the Productivity Commission into international air services, such inquiry discussed below). For the US, 'open skies' agreements are those which, among other things, set 'liberal ground rules for international aviation markets' and allow free market competition (that is, an exclusion of 'restrictions on international route rights, number of designated airlines, capacity, frequencies and types of aircraft') and fair and equal opportunity to compete.<sup>11</sup> The US model bilateral 'open skies' agreement grants up to and including *sixth* freedom rights for both passenger and cargo (and seventh freedom rights for cargo only).

Liberalisation of air services agreements is not limited to bilaterals. In 2001 Brunei, Chile, New Zealand, Singapore and the United States signed the Multilateral Agreement on the Liberalization of International Air Transportation (MALIAT).<sup>12</sup> Peru joined subsequently, as did Tonga and Samoa, in 2002.<sup>13</sup> New Zealand has bilateral air services agreements in place that go further than the US model open skies bilateral in that those agreements provide up to eighth freedom rights<sup>14</sup> for passenger and cargo.<sup>15</sup> It successfully proposed a Protocol to the MALIAT such that parties to it (who are also parties to the main agreement) can agree to exchange full seventh and eighth freedom rights, that is, rights 'higher' than the US model. Other features of the MALIAT include no 'substantial ownership' requirement and no frequency, capacity or aircraft restrictions.<sup>16</sup>

Further, regional and plurilateral aviation markets have been formed and are proposed. Europe has an internal aviation market, the Single European Aviation Market, with abolition of the internal barriers between member States. And ASEAN transport ministers

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<sup>11</sup> J D McClean et al, *Shawcross and Beaumont Air Law*, 4<sup>th</sup> ed (Butterworths, London, 2005), p. IV 115. Most open skies agreements, however, continue to provide for ownership and control restrictions.

<sup>12</sup> On the MALIAT see <http://www.maliat.govt.nz/sitemap.shtml> and Paul Stephen Dempsey, 'Moving to Multilateral Air Traffic Rights', *Address Before the 25<sup>th</sup> ALAANZ Conference*, Auckland, New Zealand, 6 April 2006.

<sup>13</sup> <http://www.maliat.govt.nz/sitemap.shtml>.

<sup>14</sup> An 'eighth freedom right' is the right to carry passengers or cargo within a foreign country with connecting or continuing service to or from one's own country (also known as 'consecutive cabotage'; the grant of such freedom is rare, although New Zealand and other States consider it). A 'ninth freedom right' is the right to carry passengers or cargo within a foreign country without connecting or continuing service to or from one's own country (or 'stand alone' or 'pure cabotage').

<sup>15</sup> Murray Denyer, 'The Multilateral Agreement on the Liberalisation of International Air Transportation', *Address to the Aviation Law Association of Australia and New Zealand*, Waitangi, New Zealand, December 2001, p. 3.

<sup>16</sup> *Supra*, p. 6.

have endorsed 'Open Sky', a target set for 2015 to further facilitate ASEAN's overall economic integration.<sup>17</sup>

## 2. Australia's international air services policy

### 2.1 Introduction

It was only in the mid-1960s, after a long-drawn out struggle with the States dating from 1920, that the Australian government was able to secure a national regime of air transport regulation. Part of that struggle between the Commonwealth and the States resulted in what was known as the Commonwealth's 'two-airline policy'<sup>18</sup> and, paradoxically, State and regional interests and policies contributed to its unravelling.<sup>19</sup> As Goh has noted, changes to the Commonwealth's domestic policy, including the end of the two-airline policy, deregulation of the domestic airline industry and the sale of Qantas 'made it difficult to ignore the demands for changes to the policy governing international [air] services'.<sup>20</sup>

While the end of the two-airline policy, deregulation and the sale of Qantas all pre-date the present Australian government, the last decade has been a crucial period for international air services. Liberalisation of such services has gathered pace around the world, and open skies agreements are increasingly being concluded. It has been said that the Australian government has adopted a policy of liberalisation of bilateral air services agreements, and DOTARS

has been negotiating extra capacity ahead of actual demand and expanded market and network opportunities. Agreements are being negotiated with more countries and the range of traffic and market access rights is increasing.<sup>21</sup>

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<sup>17</sup> Peter Forsyth et al, *Preparing for Open Sky: AADCP Regional Economic Policy Support Facility Research Project 02/008* (Monash International Pty Ltd, Melbourne, 2004), p. i.

<sup>18</sup> After the defeat of the Labour government at the 1949 federal election, the new conservative Liberal government announced a domestic 'two-airline policy', with the stated aim of securing 'the retention of the major airlines, in competitive service to the Australian community' (Commonwealth of Australia, *Commonwealth Parliamentary Debates*, vol 215 (Commonwealth of Australia, Canberra, 1951), p. 2399). The Commonwealth in effect, sought to ensure the continued operation of a private airline, Australian National Airways (ANA), which had dominated the airline industry, and to avoid Trans Australia Airlines (TAA), the Commonwealth government airline, from becoming a monopoly. This two-airline policy continued, with various amendments to the Commonwealth legislative framework under which it operated, from its inception in 1952 to the repeal of the Airlines Agreement Act in 1990 by the Labour government, deregulation of the domestic airline industry and the resultant sale of Qantas and emergence of new entrants in the provision of domestic air services, with resultant implications for Australia's international air services.

<sup>19</sup> See, generally, Martin Painter, *The Politics of Economic Reform: The Transformation of the Australian Domestic Aviation Industry* (unpublished manuscript, 1995).

<sup>20</sup> Jeffrey Goh, *The Single Aviation Market of Australia and New Zealand* (Cavendish Publishing Limited, London, 2001), p. 75.

<sup>21</sup> Productivity Commission, *supra*, note 8, p. XXV.

Also, most of Australia's air services agreements contain multiple designation of its airlines.<sup>22</sup> Nonetheless, as noted in 1998,

[i]f Australia does not move rapidly, the rest of the world could liberalise around it. Australia would be disadvantaged if air transport services between other countries became relatively more efficient. And Australian carriers would be disadvantaged in their pursuit of new and larger international markets if other markets liberalised ahead of ours.<sup>23</sup>

Despite the government's conclusion with New Zealand of a Single Aviation Market soon after its election in 1996,<sup>24</sup> the agreement for which provides up to and including ninth freedom rights,<sup>25</sup> Australia has participated only modestly (or 'gradually', as the Productivity Commission describes it<sup>26</sup>) in this air services liberalisation process.

## 2.2 The Productivity Commission report and Australia's liberalisation of international air services

In December 1997 the Treasurer, Peter Costello, in accordance with the new government's Legislation Review Schedule,<sup>27</sup> referred Australia's policy on international

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<sup>22</sup> *Supra*.

<sup>23</sup> *Supra*, p. XXIX.

<sup>24</sup> Discussions were initiated and the agreement substantially negotiated by the previous Labor government.

<sup>25</sup> The genesis of the SAM is contained in a 1992 Memorandum of Understanding (MOU) between Australia and New Zealand which added to the framework established by the first Australia-New Zealand air services agreement in 1961. The 1992 MOU was a significantly liberal agreement and reflected to an unusual degree the trend towards air services liberalisation. It provided for multiple airline designation, capacity to be determined by the parties, operations from any designated airport (with qualifications), 'beyond' routes, 'beyond' capacity, and full domestic traffic rights in the territory of the other party – a framework for a single aviation market by any other name. As first created in 1992, the SAM 'add[ed] to the force of moving international air transport relations to a new era; one that is not restrained by ... arcane and mercantilist rules and practices' (Goh, *supra*, note 20, p. 160).

In 1996 the newly-elected Australian government implemented with New Zealand single aviation market arrangements ([http://www.dfat.gov.au/geo/new\\_zealand/sam.pdf](http://www.dfat.gov.au/geo/new_zealand/sam.pdf)). In 2000 the two countries signed an MOU on open skies and initialled the text of a draft air services agreement (and annex) (<http://www.mft.govt.nz/foreign/regions/australia/austopenskies.html>). These documents, together with the subsequent, formal 2002 Australia-New Zealand air services agreement, reflect and build on the principles contained in the 1996 SAM arrangements. The open skies agreement between Australia and New Zealand was – and remains – Australia's first and only full open skies agreement (John Anderson and Mark Gosche, *Australia-New Zealand Open Skies Agreement*, Joint Media Release, 20 November 2000); as the Australian government said at the time, it was 'effectively the first open skies agreement that we have been able to strike' (Koutsoukis, *supra*, note 3). In material provided by the New Zealand government, it said that 'New Zealand is at the forefront of aviation liberalisation. While this is Australia's first 'open skies' agreement, New Zealand has 10 such agreements' (New Zealand Government, *supra*, note 3).

<sup>26</sup> Productivity Commission, *supra*, note 8, p. 221.

<sup>27</sup> The federal Liberal Government was elected in 1996 and has won four consecutive terms in office.

air services agreements<sup>28</sup> to the Australian Productivity Commission<sup>29</sup> for inquiry and report.<sup>30</sup> Its terms of reference were, in part, to 'analyse and assess the benefits, costs and overall effects of the international aviation regulatory framework and Australia's approach to negotiating bilateral air services agreements ... [and] assess the options for greater liberalisation'.<sup>31</sup>

Reporting in 1998, the key messages of the Commission's report were that the government had not been loosening bilateral air services restraints quickly enough and that a consistent policy of reciprocal bilateral, plurilateral and multilateral open skies was needed.<sup>32</sup> A further message was that, unless Australia took action, the world could liberalise around it.<sup>33</sup>

The government in its 1999 response to the Productivity Commission's report appeared to agree with most of the Commission's liberal recommendations. However, such agreement upon close examination was for the most part either heavily qualified or came with conditions. Further, some recommendations to which the government ostensibly agreed have never been implemented. A number of significant recommendations were rejected.

In outline form, in the view of the government (and notwithstanding the view of the Commission), its 'liberal approach to international air services' had already been 'highly successful'. It would 'now free up international air services even further, within the constraints of the existing bilateral aviation system'.<sup>34</sup> It clearly would not be able to 'free up international air services' within any multilateral aviation system; in 2001, as further set out below, the government participated in the negotiations of but, alone among the participants, elected not to sign up to the very liberal MALIAT.<sup>35</sup>

The Commission recommended that that Australia should 'negotiate reciprocal 'open skies' agreements on a bilateral basis' which would remove restrictions on capacity and frequency, codesharing, routes, multiple designation of airlines, ownership as a basis for designation and prices.<sup>36</sup> The government agreed but (a) made no mention of reciprocity and stated that open skies agreements cannot always be achieved; and (b) implied that progress in areas identified by the Commission (as above) had already been made and may go no further. Moreover, while apparently agreeing to removing ownership as a basis for airline designation, the government responded that the forum in which that

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<sup>28</sup> And its policy on the International Air Services Commission. However, this article considers only those recommendations of the Productivity Commission with regard to international air services agreements. The article also does not consider Productivity Commission recommendations made with regard to airports.

<sup>29</sup> At the time of the reference the Industry Commission.

<sup>30</sup> Productivity Commission, *supra*, note 8, p. XIX.

<sup>31</sup> *Supra*, p. XX.

<sup>32</sup> Productivity Commission, *supra*, note 8, p. XXI.

<sup>33</sup> *Supra*, p. XXIX.

<sup>34</sup> John Anderson and Peter Costello, *International Air Services*, Joint Media Statement, 3 June 1999 ([http://www.ministers.dotars.gov.au/ja/releases/1999/june/a79\\_1999.htm](http://www.ministers.dotars.gov.au/ja/releases/1999/june/a79_1999.htm)).

<sup>35</sup> Denyer, *supra*, note 15, p. 7.

<sup>36</sup> Productivity Commission, *supra*, note 8, p. XXIX.

should take place was the GATS. Other aspects to the government's 'agreement' with regard to reciprocal open skies agreements were qualified.<sup>37</sup>

The government stated its qualified agreement to a Commission recommendation that Australia 'should invite like-minded countries to discuss the formation of an open club of nations committed to liberalising international aviation through a common plurilateral 'open skies' agreement, but no such invitation appears to have been made.

Further, the government appeared to agree to participate in a process for including all air services in the GATS, but ignores that part of the Commission's recommendation that it should promote such inclusion.<sup>38</sup> With regard to consideration of liberalising ownership and control provisions on a plurilateral or multilateral basis, and development and recognition of a regional arrangement to enable relaxation of ownership and control criteria, the government agreed but, in so doing, it rejected the core elements of the Commission's recommendations. And, as mentioned above, the government three years later elected not to sign the MALIAT.

There is a difficulty in assessing the government's actual versus stated response to a number of Commission recommendations in that, notwithstanding government agreement to publish (and keep updated) a statement of its aviation policy in response to a specific Commission recommendation to that effect,<sup>39</sup> it has not done so with regard to international air services. Nonetheless, the government's response to the Commission's recommendations - partial agreement, piecemeal implementation, qualifications, conditions and rejections – results, perhaps unsurprisingly, in a policy with internal contradictions and inconsistencies.<sup>40</sup> A number of these contradictions and inconsistencies are also revealed through the government's 2005-2006 review, its Pacific decision and its aftermath.

### 2.3 Benefits of liberalisation and the Australian liberalisation experience

As research from Australia's Parliamentary Library makes clear, the case for air services liberalisation in terms of entry and pricing is supported by international experience.<sup>41</sup> Results from a survey of experience in OECD countries demonstrated that that 'air transport reforms aimed at liberalising entry (e.g. by eliminating bilateral designation rules or extending charter flights) and prices involve significant benefits for all categories of travellers'.<sup>42</sup> Further, a major 2006 study of the economic impact of air services liberalisation<sup>43</sup> found

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<sup>37</sup> Anderson and Costello, *supra*, note 34.

<sup>38</sup> *Supra*.

<sup>39</sup> *Supra*.

<sup>40</sup> Taking the text of the Commission's report and the government's response together.

<sup>41</sup> Webb, *supra*, note 3, p. 6.

<sup>42</sup> R Gonenc and G Nicoletti, *Regulation, Market Structure and Performance in Air Passenger Transportation*, OECD Economics Department Working Paper No 254, 2000, p. 11.

<sup>43</sup> Supported by, amongst others, Airports Council International, Air Transport Action Group, Boeing, General Electric, IATA, Pacific Asia Travel Association, US-ASEAN Business Council and the World Travel & Tourism Council.

extensive and significant evidence that ... liberalization of air services between countries generates significant opportunities for consumers, shippers, and the numerous direct and indirect entities and individuals affected by such liberalization. Conversely, it is also evident that restrictive bilateral air services agreements between countries stifle air travel, tourism and business, and, consequently, economic growth and air travel.<sup>44</sup>

The study also found that air traffic growth between countries post-liberalisation averaged between 12% and 35% which was 'significantly greater' than during years prior to such liberalisation and that a study of 2,000 bilateral agreements and 190 countries suggested that a number of countries continued to protect their flag carrier or carriers 'rather than enhancing the overall welfare of the broader public interest'.<sup>45</sup>

In Australia, the 1998 Productivity Commission report found that liberalisation of international air services would, amongst other things, benefit consumers through lower fares and stimulate downstream industries such as tourism.<sup>46</sup> Other organisations have analysed the benefits to consumers and industry, for example, of air services liberalisation, and economic growth flowing from such liberalisation. In the context of the Pacific route these are outlined at part 3.2 below.

Eight years after the Commission report it is clear that parts of the world have liberalised around Australia (for instance, the disparate countries and markets of the United States, Singapore and New Zealand), and other markets have liberalised ahead of Australia's.<sup>47</sup> Australia has concluded an all-cargo agreement with the US, and an open freight agreement with no capacity limits and open routes with India.<sup>48</sup> It has also concluded a 'horizontal' agreement with the EU which allows European airlines to fly from EU nations, including from points outside their home country, to Australia. Put another way,

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<sup>44</sup> InterVISATAS-ga2, *The Economic Impact of Air Service Liberalization* (InterVISATAS-ga2, Washington, D.C., 2006), p. ES-2.

<sup>45</sup> *Supra*; a 'simulation of the likely results of liberalizing 320 country pair markets that are not today in an Open Skies (deregulated) mode indicate traffic growth, on average, of almost 63 percent ... Liberalizing only these 320 bilateral agreements of the 2,000 in our database would create 24.1 million full-time jobs and generate an additional \$490 billion in Gross Domestic Product'.

<sup>46</sup> Productivity Commission, *supra*, note 8, pp. XXI-XXV.

<sup>47</sup> Australia has, however, more than almost all other countries, significantly liberalized its *domestic* market. With regard to domestic carriers, no ownership restrictions exist concerning foreign participation. As a result, any foreign person - any foreign carrier - can in principle own up to 100% equity of an Australian domestic carrier (subject to Foreign Investment Review Board approval) (see John Anderson, *International Air Services: A Policy Statement by The Hon John Anderson MP, Deputy Prime Minister and Minister for Transport and Regional Services*, June 2000 [[www.dotars.gov.au/avnapt/ipb/intairservices.aspx](http://www.dotars.gov.au/avnapt/ipb/intairservices.aspx)]). While acknowledging and setting out the links, both historical and present, between domestic and international aviation policy, this article, however, and the arguments presented here, go to Australia's *international* air services policy.

<sup>48</sup> John Anderson, *Significant Liberalisation for the Australia-India Airservices Agreement*, Media Release, 15 September 2004. [http://www.ministers.dotars.gov.au/ja/releases/2004/September/a124\\_2004.htm](http://www.ministers.dotars.gov.au/ja/releases/2004/September/a124_2004.htm).

the agreement provides all EU airlines access to traffic rights (or freedoms) under existing bilateral agreements between individual EU countries and Australia.

In July 2006, Australia and the UK announced an agreement, although not one of open skies, in which restrictions on the number of flights between Australia and the UK would be lifted, with unrestricted rights beyond the UK but for the US and China<sup>49</sup> (albeit of limited value). Notwithstanding the removal of capacity and frequency limits, any new grant of rights under the agreement are in effect for Qantas. Ownership and control provisions remain unchanged.

Together with its open skies agreement with New Zealand, however, the above agreements essentially represent Australia's sole liberalisation achievements. It has not been successful in concluding other substantive, liberalised 'open skies' agreements with other countries, a point made by the New Zealand government in 2000.<sup>50</sup> As one critic of government policy has stated,

[t]he best indicator of how serious the Government is about open skies is its record ... In six years, it has signed only one full open-skies agreement (with New Zealand) and only one cargo-only open skies agreement (with the US). In contrast, the US has signed 40 in the past six years ... A possible government defence is that the US, with its huge bargaining power, can more easily strike these agreements. But even NZ has 11 open-skies agreements in place. And NZ, Singapore and the US signed the first multilateral open-skies agreement in 2001.<sup>51</sup>

## 2.4 A policy lacuna

From July 2000 to February 2006,<sup>52</sup> in what the then-Minister for Transport and Regional Services referred to as 'this environment of rapid [aviation] change',<sup>53</sup> there were no detailed statements or media releases from DOTARS with regard to Australia's international air services policy, and no statements with regard to Australia's failure to sign the MALIAT, the government's participation in that agreement's negotiations notwithstanding. Despite the Productivity Commission's 1998 recommendation, and the government's agreement with it, no comprehensive and regularly updated statement of the government's international air services aviation policy was published. But for brief media releases with regard to specific air services talks and agreements, and the trans-Pacific route review, neither the Minister nor the Prime Minister provided any review or comprehensive statement of, and made no dedicated speech on, Australia's international air services policy.

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<sup>49</sup> Warren Truss, *Breakthrough in Air Services Talks with the UK*, Media Release, 7 July 2006 ([http://www.ministers.dotars.gov.au/wtr/releases/2006/July/108WT\\_2006.htm](http://www.ministers.dotars.gov.au/wtr/releases/2006/July/108WT_2006.htm)); Adrian Rollins, 'Flights to UK more frequent, in theory', *The Australian Financial Review*, 8-9 July 2006.

<sup>50</sup> New Zealand Government, *supra*, note 3.

<sup>51</sup> Paul Kerin, 'The sky's the limit', *Business Review Weekly*, 20-26 October 2005.

<sup>52</sup> The months and years in which, respectively, the government responded to the Productivity Commission review and announced the findings of its review of international air services policy.

<sup>53</sup> Anderson, *supra*, note 47.

Further, while the government agreed, in response to a recommendation from the Productivity Commission in its 1998 report, to develop a consultative process 'which encompasses all major interested parties to [in part] obtain their views' on air services agreements being negotiated and to establish a twice yearly International Aviation Conference for that purpose,<sup>54</sup> no such conference was established or convened. The government rejected a Commission recommendation to establish an interdepartmental committee to consider and endorse all proposals relating to Australia's air services negotiating position.

### **3. The Pacific route: Review of Australia's international air services policy, 2005-2006**

#### **3.1 Terms of reference, review body and timeframe**

The 1998 Productivity Commission review of Australia's international air services came with clear terms of reference from the government and clear parameters for its inquiry. In June 2005, however, another review - apparently (although not obviously) of Australia's international air services policy - initiated by the government lacked any public policy statement as to its scope, rationale or objectives. Newspaper reports, however, referred to a complete review of the 'aviation industry' and that a

top-level ministerial committee [would] consider major changes to aviation policy including lifting restrictions on foreign ownership of Qantas. It will also review market access rules for foreign airlines into Australia and on other key international routes including the Pacific.<sup>55</sup>

No detail was provided as to the composition of the committee. Reports referred to the Prime Minister, Deputy Prime Minister and Minister for Transport, and Foreign Minister commencing 'informal discussions on issues affecting Australia's aviation industry'.<sup>56</sup> Toward what then appeared to be end of the review period it was reported that the review had been conducted by the Prime Minister, the Treasurer (Peter Costello), the Transport Minister (Warren Truss, succeeding John Anderson) and Mark Vaile, the Trade Minister.<sup>57</sup>

The review was reportedly initiated after the government was told by Qantas that it 'was at a crossroads and would consider a major restructure, reportedly exporting as many as 3000 jobs overseas, if there was not an aviation policy overhaul'. Further, in Qantas' view, 'Australia's aviation policy has relied almost exclusively on market access ... Australia's aviation industry needs a supportive and forward-looking policy that recognises the industry's vital national importance and economic contribution'.<sup>58</sup>

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<sup>54</sup> Anderson and Costello, *supra*, note 34.

<sup>55</sup> Dennis Shanahan and Patrick Walters, 'Howard protects Qantas', *The Australian*, 11 June 2005.

<sup>56</sup> *Supra*.

<sup>57</sup> Louise Dodson, 'Qantas keeps LA to itself', *The Sydney Morning Herald*, 20 February 2006.

<sup>58</sup> Steve Creedy, 'Qantas wants tax cut, protection', *The Australian*, 13 June 2005.

In addition, Qantas called for 'an examination of the overall tax burden on airlines ... and a review of aircraft depreciation, security costs, airport pricing, war risk insurance and the duty paid on aircraft parts' in any review or 'policy overhaul'. It also wanted the Qantas Sale Act amended such that foreign ownership was not limited to 49%.<sup>59</sup>

Notwithstanding the absence of any government statement as to the scope of the 2005-2006 review of Australia's international air services policy, it became clear from newspaper and other reports that the focus of the review was access to the Pacific route by Singapore Airlines.

### 3.2 Economic arguments for liberalisation on the Pacific route

The economic and trade arguments in favour of air services liberalisation generally and, on occasion, an Australia-Singapore open skies agreement – with attendant implications for the Pacific route - have been made by the Australian government in the years after the Productivity Commission report. In 2002, the government acknowledged that Singapore Airlines had played a major role in developing inbound tourism, was 'keen to provide opportunities for Singapore Airlines to broaden and deepen its involvement in our market' and was confident that an Australia-Singapore open skies agreement 'would create additional opportunities for the development of our aviation market'.<sup>60</sup> Under the 2003 Singapore-Australia Free Trade Agreement the parties 'agree[d] to work towards an open skies agreement'.<sup>61</sup> In 2006, the government recognised

the need to provide reasonable opportunities for foreign carriers committed to Australia to grow their operations here ... [and] to attract and retain major foreign airlines to Australia to provide competition and improve our access to global trade and tourism markets.<sup>62</sup>

The Australian Department of Transport and Regional Services' Bureau of Transport and Regional Economics (BTRE) provided the government during the 2005-2006 review with an assessment of the economic benefits of liberalisation on the Pacific route. The government stated that the assessment revealed the economic benefits of such liberalisation were 'very small' – on one report, a range between AUD10 million and 45 million<sup>63</sup> and, on another, a net benefit to the economy of AUD 10 million at best in the first year of liberalisation, negligible benefits for several following years, and an ongoing annual benefit thereafter of AUD 2 million.<sup>64</sup> Despite calls for the government to release

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<sup>59</sup> *Supra*. In addition to the 49% foreign ownership limit, foreign individual share ownership is limited to 25% and combined foreign airline ownership to 35% under the Qantas Sale Act.

<sup>60</sup> Laura Tingle and Tracy Sutherland, 'Qantas deal clouds Singapore free-trade talks', *The Australian Financial Review*, 30 May 2006.

<sup>61</sup> Laura Tingle, 'Sky is not the limit: Singapore', *The Australian Financial Review*, 1 June 2006.

<sup>62</sup> Warren Truss, *Address to the BTRE Transport Colloquium*, 14 June 2006 ([http://www.ministers.dotars.gov.au/wtr/speeches/2006/WS13\\_2006.htm](http://www.ministers.dotars.gov.au/wtr/speeches/2006/WS13_2006.htm)).

<sup>63</sup> David Humphries and Scott Rochfort, 'Singapore stays shut out of key US route', *The Sydney Morning Herald*, 22 February 2006; Webb, *supra*, note 3, p. 10.

<sup>64</sup> Katharine Murphy and Steve Creedy, 'Benefit of rival airline modest', *The Australian*, 8 December 2005.

the BTRE report to support its claims that Pacific route liberalisation economic benefits are small,<sup>65</sup> the report has not yet been released.<sup>66</sup>

Econtech, an Australian economic consultancy,<sup>67</sup> however, found that competition on the Pacific route would increase the number of travellers between the US and Australia by 8%, and US visitors to Australia would spend an additional AUD 114 million per year.<sup>68</sup> Further, it concluded that, on the Pacific route, Qantas charges almost 40% more on a per-kilometre basis compared with routes with more competition, including the London route.<sup>69</sup>

Research conducted by the Australian Parliamentary Library concludes that the arguments and experience, both international and for Australia, 'are persuasive that further liberalisation would benefit travellers and the tourism and air freight industries'.<sup>70</sup>

Based on their studies of inbound tourism and tourism growth, the major Australian 'gateway' airports also argue that a 'harder' government line on allowing international carriers to fly to Australia – for example, in addition to refusing Singapore access to the Pacific, refusing approaches from Qatar Airways, Vietnam Airlines and a Taiwanese carrier<sup>71</sup> - hinders economic growth and tourism.<sup>72</sup> In particular, these airports argue that much of the growth in international air traffic over recent years has come from such carriers.<sup>73</sup> Melbourne Airport's CEO warned that 'the city's international capacity growth was endangered by a [government international air services] policy that was asking too much in return for increased access'.<sup>74</sup> Since 2000, international capacity growth at Melbourne has come wholly from non-Australian international carriers.<sup>75</sup> Airports also argue that government barriers to new entrants keep airfares too high.<sup>76</sup>

In addition to Melbourne, Sydney and Brisbane airports, tourism, travel and industry bodies argue that 'billions of dollars' worth of international tourism and investment' are lost 'because of federal government barriers facing overseas airlines coming to

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<sup>65</sup> Editorial, 'Flying in the face of reason', *The Australian Financial Review*, 22 February 2006.

<sup>66</sup> Webb, *supra*, note 3, p. 11.

<sup>67</sup> Retained by Singapore Airlines.

<sup>68</sup> Lisa Allen, 'Critics fly off the handle,' *The Australian Financial Review*, 25-26 February 2006; Humphries and Rochfort, *supra*, note 63.

<sup>69</sup> *The Australian Financial Review*, *supra*, note 65; Allen, *supra*; Webb, *supra*, note 3, p. 10;

<sup>70</sup> Webb, *supra*.

<sup>71</sup> Steve Creedy, 'Qantas 'focus' risking tourism', *The Australian*, 1 June 2006.

<sup>72</sup> Reading 'goods' for 'services' and 'imports' for international carriers and inbound travellers, a recent conclusion on free trade by *The Economist* following the collapse of the Doha round of trade talks may be apposite: 'The benefits from free trade come more from imports than from exports. Imports of cheaper or better goods give consumers more for their money and, through competition, raise domestic productivity': 'The future of globalisation', *The Economist*, 29 July 2006, p.11.

<sup>73</sup> See, for example, Steve Creedy, 'Qantas rejects being favoured', *The Australian*, 2 June 2006.

<sup>74</sup> *Supra*.

<sup>75</sup> Steve Creedy, *supra*, note 71; see also Scott Rochford, 'Queensland calls for open skies', *The Sydney Morning Herald*, 26 July 2006

<sup>76</sup> Neelam Mathews, 'Tourism Status Quo', *Aviation Week & Space Technology*, 12 June 2006, p. 43, citing Binit Somalia, Center for Aviation Policy.

Australia'.<sup>77</sup> Critics of the government's liberalisation policy argue that it does not encourage growth, which hurts tourism; 'growth in airline seat capacity is essential for tourism growth. The government needs to adopt a genuinely liberal attitude toward air access issues. If international visitors can't get a flight here, they go somewhere else'.<sup>78</sup>

### 3.3 Review decision and some inconsistencies

The government announced the findings of its review on 21 February 2006. It stated that,

[i]n terms of Singapore Airlines request for access to the Pacific route, the Government has decided not to grant access at the present time. If access is negotiated in the future, it will be limited and phased. We would not envisage Singapore airlines operating on the route for some years.<sup>79</sup>

Nonetheless, the government 'may in the future negotiate access to the [Pacific] route on a case-by-case basis where it is in the national interest and where we can gain benefits to Australia'.<sup>80</sup>

The review found 'that the base policy settings we [the government] have had in place since 1999 are sound' and that the government would 'continue these directions with some refinement to our negotiating objectives'.<sup>81</sup> For the government in 2006, open skies is 'an aspirational goal to be sought on a case-by-case basis, where it is in the national interest'.<sup>82</sup> The government 'also considered Qantas' request for changes to the Qantas Sale Act in relation to its ownership rules and ... decided not to make any changes'.<sup>83</sup>

The 2005-2006 review findings, and the government's policy statement, took the form of a two-page media release issued by the Minister for Transport and Regional Services.

Consistent with Australia's international air services policy over the last decade, the findings of the 2005-2006 review as announced by the government contain a number of contradictions. For example, as evidenced by statements made by members of the government, that government argued that it had adopted a 'highly successful' liberal international air services policy before the 1998 Productivity Commission Report<sup>84</sup> and

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<sup>77</sup> 'Aviation barriers 'costing billions', *The Australian*, 26 July 2006; this is the first time that such organisations have coordinated 'such a public push in favour of liberalisation' (Scott Rochford, *supra*, note 75). Organisations arguing for more competition include, in addition to Melbourne, Sydney and Brisbane airports, the Australian Hotels Association, the Australian Consumers Association and the Queensland Industry Tourism Council.

<sup>78</sup> Neelam Mathews, *supra*, note 76. Federal Tourism Minister Fran Bailey argues that the US inbound market, worth AUD 2.26 billion to the Australian economy, would grow if there was, in turn, greater growth in airline seat capacity: Lisa Allen, *supra*, note 68.

<sup>79</sup> Truss, *supra*, note 2.

<sup>80</sup> *Supra*.

<sup>81</sup> *Supra*. Many of the announced refinements, however, were also part of the government's 1999 response to the Productivity Commission's recommendations.

<sup>82</sup> *Supra*.

<sup>83</sup> *Supra*.

<sup>84</sup> Anderson and Costello, *supra*, note 34.

stated that such policy became even more liberal in the period after the Commission's report; references were subsequently made to 'significant liberalisation' of air services agreements.<sup>85</sup> However, in the findings of the 2005-2006 review, 'open skies' is now (for the government) merely an 'aspirational goal' and one yet to be achieved, yet one which the government believes is in line with 'base policy settings' and directions in place since 1999 - policy and directions which the government has stated to be significantly and substantively liberal.

Further, in denying Qantas' request for amendment to the Qantas Sale Act such that foreign ownership would not be limited to 49%, the government stated that Australia's bilateral air services agreements

require airlines to be substantially owned by Australian interests. Maintaining current ownership requirements provides certainty and ensures this icon company [Qantas] remains in Australian hands.<sup>86</sup>

Notwithstanding this finding, however, the government said that it would seek 'to designate airlines through their principal place of business',<sup>87</sup> with no apparent awareness of the difficulty in reconciling the two statements.

#### **4. How to explain the government's Pacific decision?**

##### **4.1 A focus on carrier 'differential circumstances' rather than the added value of liberalisation**

During the review period, in putting its case for protection on the Pacific route, Qantas argued that both Singapore Airlines and Emirates enjoyed substantial subsidisation from their respective governments.<sup>88</sup> In effect it argued that the 'playing field' was not a level one, and it was an argument echoed by the government.<sup>89</sup> Thus, the Australian prime minister stated at the end of 2005 that

[a]ll the arguments are not in favour of changing the policy [regarding access to the trans-Pacific route]. There are very strong arguments put by Qantas that the current policy, at least in the near term, should be kept. I believe in the value of competitive tension in any market. But you have got to be absolutely certain that

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<sup>85</sup> See, for example, Anderson, *supra*, note 48.

<sup>86</sup> Truss, *supra*, note 2.

<sup>87</sup> *Supra*.

<sup>88</sup> See Shanahan and Walters, *supra*, note 55; Steven Lott, 'Allegations Fly Down Under', *Aviation Week & Space Technology*, 21 November 2005, p. 59; and Steve Creedy, 'Qantas vows to stop Emirates', *The Australian*, 10 February 2006.

<sup>89</sup> Scott Rochfort, 'Singapore Air rejects PM's claim it receives handouts', *The Sydney Morning Herald*, 10 December 2005. By way of response Singapore Airlines pointed to debt relief provided by the government to Qantas in the 1990s: Chew Choon Seng, 'Protection doesn't serve us well', *The Australian*, 21 February 2006

each participant in the market is coming from the same launching pad as far as government support and so forth is concerned.<sup>90</sup>

Similarly, Deputy Prime Minister Mark Vaile, in conceding ‘that the interests of Qantas would drive much of the cabinet debate’ on route access and aviation policy said that ‘[w]e just can’t take a purist view to this ... We have an airline in Australia that operates under a totally transparent regime and pays its taxes in Australia ... We need to [achieve competition] in a balanced way that reflects the differential circumstances that many of the global carriers operate under, that is different to Qantas’.<sup>91</sup>

In the light of Qantas’ arguments and the above statements, it appears that the government’s decision on carrier access to the Pacific route may have focussed rather more on the financial and other advantages which potential rivals to Qantas on that route – specifically Emirates and Singapore Airlines – enjoy, and that Qantas does not, rather than on the economic or other advantages which might accrue in providing access to such airlines. The argument, then, from government comments referred to above, is that competition can only take place provided that the playing field is a level one. Such an argument has been labelled specious on the basis that

[i]t could have been used to block any of the major [Australian] reforms of the past 20 years – from floating the dollar to cutting tariffs on manufacturing and deregulating the labour market. Participants in those markets could all claim the playing field wasn’t level. And yet over this period, the Australian economy has grown faster than virtually all other rich countries and unemployment has fallen to 30-year lows<sup>92</sup>

#### **4.2 The interests of Qantas drove much of the cabinet debate**

Six months after the review announcement, during which time it became clear that the review was focused on access to the Pacific route, Prime Minister Howard ‘gave assurances that ‘national interest’ arguments’, impliedly those of Qantas, ‘would outweigh calls for the opening-up of aviation markets’ ahead of a cabinet decision on ‘open skies’ policy.<sup>93</sup> In addition to the comments of the Deputy Prime Minister set out above, Environment Minister Ian Campbell ‘declared himself to the cabinet emphatically pro-Qantas’, saying that ‘[w]e have to think very carefully about Australia’s national interests when we’re trading in access to a very lucrative market’. For Senator Campbell, this meant protecting Qantas from competition on the trans-Pacific route,<sup>94</sup> as it did for John Anderson, a former Deputy Prime Minister and Transport Minister who ‘warned his

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<sup>90</sup> Tansy Harcourt, ‘PM defends Pacific route’, *The Australian Financial Review*, 9 December 2005.

<sup>91</sup> Steve Lewis and Steve Creedy, ‘We will stand by Qantas, says PM’, *The Australian*, 9 December 2005.

<sup>92</sup> Editorial, *The Australian Financial Review*, *supra*, note 65.

<sup>93</sup> Lewis and Creedy, *supra*, note 91.

<sup>94</sup> Katharine Murphy, ‘Qantas must be shielded: Minister’, *The Australian*, 6 December 2005.

former cabinet colleagues ... not to expose Australia's national carrier to greater competition'.<sup>95</sup>

Qantas stated in the context of the review that any relocation of Qantas jobs overseas, or job losses, depended on the government's policy decisions.<sup>96</sup> Nonetheless, ahead of the government's review decision on new policy concerning the Pacific route (and, more broadly, air services liberalisation), such review called for by Qantas, Geoff Dixon, Qantas' chief executive, said with no apparent irony that Qantas intends 'to take full advantage of the federal government's liberalisation of the industrial relations regime to improve the efficiency of its workforce – meaning more job losses are inevitable'.<sup>97</sup>

It is clear that, again rather than a clear focus on benefits to the economy, inbound tourism, passenger growth or related issues, much of the cabinet discussion on liberalising the Pacific route focussed on the interests of Qantas, and those interests drove much of the cabinet debate. Impediments to the government deciding on a policy of liberalisation on the Pacific route included 'the unequal quality of airlines, their financial strengths, vested political and commercial interests ... and, generally, how countries perceive their national aviation interests'.<sup>98</sup>

The review's focus on the interests of Qantas perhaps is unsurprising given that the review was apparently initiated after warnings by Qantas that, amongst other things, and absent any 'policy overhaul' that looked not so much at market access but 'the industry's vital national importance and economic contribution',<sup>99</sup> jobs might be exported. What is surprising, however, in that context, is that the interests of Qantas were not well served by the government with regard to its request for an examination of matters including amendment of the Qantas Sale Act such that foreign ownership was not limited to 49%, and aircraft depreciation.<sup>100</sup> The government denied the former request, and no Qantas aircraft depreciation standard competitive with that of Singapore Airlines – that is, a more attractive aircraft depreciation schedule - was announced.<sup>101</sup>

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<sup>95</sup> *Supra*. This appears to be a curious position for Mr Anderson to take when considered against his 2002 comments that the government was 'keen to provide opportunities for Singapore Airlines to broaden and deepen its involvement in our market' and was confident that an Australia-Singapore open skies agreement 'would create additional opportunities for the development of our aviation market': Tingle and Sutherland, *supra*, note 60.

<sup>96</sup> *The Australian*, 'Qantas jobs hang on 'policy'', 16 February 2006; see also James Hall, 'Qantas cannot afford to hang around', *The Australian Financial Review*, 18-19 February 2006.

<sup>97</sup> James Hall, 'Qantas to wield axe as profit slides', *The Australian Financial Review*, 17 February 2006.

<sup>98</sup> Prith Pal Singh, 'SIA can regain high ground only by changing approach' (<http://www.channelnewsasia.com/stories/analysis/view/153206/1.html>).

<sup>99</sup> Creedy, *supra*, note 58.

<sup>100</sup> *Supra*. In addition to the 49% foreign ownership limit, foreign individual share ownership is limited to 25% and combined foreign airline ownership to 35% under the Qantas Sale Act.

<sup>101</sup> Steve Lewis, 'Qantas safe as cabinet dumps Singapore', *The Australian*, 20 February 2006. Such depreciation standard or schedule would reportedly have provided Qantas with a significant tax benefit over the next 10 years (Lewis).

Accession to both requests would, perhaps, have been more useful to Qantas. Such accession would also have represented a proportional and consistent response by the government to specific taxation and other advantages and subsidisation which, the government had argued, Singapore Airlines and others enjoy from their governments.<sup>102</sup>

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In seeking to address the blurring of the line between the 'national aviation interest' and the 'interests of national carriers', the chief executive of Singapore Airlines, Chew Choon Seng, writing in *The Australian*, stated that

[p]roviding competition, increasing tourism and business flows and creating more jobs is clearly in Australia's national interest and is a proven consequence of aviation liberalisation ... Maintaining protection of Qantas on the US route would fly in the face of its [the government's] own record on free trade and liberalising the economy to increase Australia's international competitiveness ... Opening the route is now, more than ever, in the national interest.<sup>103</sup>

The obvious problem for the government, however, in denying Singapore Airlines access to the Pacific route, stated baldly, is this: '[H]ow does it [the government] then turn around and beg all its major economic partners for free trade agreements when its protecting one of its own very profitable companies?'<sup>104</sup>

Such a problem manifested itself some months after the review in a slightly different form. The 2003 Singapore-Australia Free Trade Agreement (SAFTA) provides for both Singapore and Australia 'to work towards an open skies air services agreement and to review that work' in accordance with SAFTA Article 22.4. That article provides that Singapore and Australia will review developments in the air transport sector at the first SAFTA review or at any other time agreed between Singapore and Australia, with a view to including these developments in the agreement. The Australian Government holds the perhaps questionable view that open skies is a separate matter from the SAFTA.<sup>105</sup> Its position, when taken together with its protection of Qantas, would also appear to be inconsistent with its 14 June 2006 position that 'Australia aspires to genuinely free trade

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<sup>102</sup> In this regard see Harcourt, *supra*, note 90; Shanahan and Walters, *supra*, note 55; Lott, *supra*, note 88; Lewis and Creedy, *supra*, note 91; and Creedy, *supra*, note 58.

<sup>103</sup> Chew Choon Seng, *supra*, note 89. In an interview just prior to meeting the Australian prime minister, Mr Chew returned to this theme: 'Qantas has persuaded the Australian Government, and I suppose some part of the Australian people, that what's good for Qantas is good for Australia ... But there is a price, and the price is an economic one, because with open skies what the airline loses the country gains maybe more than double in terms of tourism, in terms of business, in terms of economic integration with the rest of the world. And I think on the strategic account there is some loss because Australia wants to be integrated with Asia and these economic linkages give us an interest in each other's success': Greg Sheridan, 'A good friend in Asia', *The Weekend Australian*, 10 June 2006.

<sup>104</sup> Tansy Harcourt, 'Geoff Dixon's valuables are in danger', *The Australian Financial Review*, 19-20 February 2005.

<sup>105</sup> Tingle and Sutherland, *supra*, note 60; Tingle, *supra*, note 61.

in the international aviation sector',<sup>106</sup> and it could make more difficult the task of it, an ostensibly 'liberal' government, seeking free trade agreements from its major economic partners.

### 4.3 Conduct of the review and flawed policy processes

The government's Pacific decision can also be explained to some extent by the scope and conduct of the review and the flawed policy processes which it represents, such processes flowing from the government's response to the Productivity Commission's 1998 report (see part 2.2 above).

The review was conducted in the context of what was referred to earlier as an international air services policy lacuna. While the Commission's recommendations and the government's response, when taken together, revealed a policy with internal contradictions and inconsistencies, virtual policy silence followed that response until the completion of the 2005-2006 review, in a period and in an 'environment of rapid [aviation] change'.<sup>107</sup> Further, notwithstanding government agreement to establish an air services policy multi-party consultative process, no such conference was established. And, rejecting a Commission recommendation, no interdepartmental committee to consider air services policy was set up (the very different New Zealand international air services policy process provides a useful comparison in this regard<sup>108</sup>).

The 2005-2006 review revealed that the Commission recommendations and the government's response did not lead to integrated and consistent policy and process. The

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<sup>106</sup> Truss, *supra*, note 62.

<sup>107</sup> Anderson, *supra*, note 47.

<sup>108</sup> Unlike Australia, New Zealand appears to have adopted a 'whole of government' approach to air services. Its international aviation policy has been developed by a committee, the inter-departmental External Aviation Policy Committee, chaired by the Ministry of Transport and comprises representatives from various New Zealand ministries (Productivity Commission, *supra*, note 8, p. 88, citing a submission to the Productivity Commission's inquiry from the New Zealand External Aviation Policy Committee [submission no 34]). As mentioned above, the Productivity Commission recommended that the Australian Government adopt such an approach and create such a committee to 'consider and endorse all proposals relating to Australia's air services negotiating position' (Productivity Commission, *supra*, note 8, p. 89). The government rejected the recommendation (Anderson and Costello, *supra*, note 34). More generally, New Zealand's international air services policy is set and implemented by the Ministry of Transport. That policy has generally been well articulated and, in 2006, it and its underpinnings are easily accessible at the Ministry of Transport and Ministry of Tourism websites (<http://www.transport.govt.nz/> and <http://www.tourism.govt.nz/>), with information on New Zealand's bilateral and multilateral air services agreements, licensing requirements and links to other, related agreements (<http://www.transport.govt.nz/business/aviation/international/index.php>). An introduction to New Zealand's open skies policies, with links, can be found at <http://www.tourism.govt.nz/policy/pol-accessnz.html#Air%20>, including the External Aviation Policy Committee and its role of setting priorities for international aviation agreements that New Zealand would like to pursue each year. The detail and explanation of the Multilateral Agreement on the Liberalization of International Air Transportation can be found at <http://www.maliat.govt.nz/sitemap.shtml>). The Ministry of Transport also publishes a free quarterly newsletter which provides information on the development of transport and, more specifically, aviation policy.

government appeared to rely solely on one in-house economic report on Pacific route liberalisation; no recourse appears to have been had to non-government economic modelling. The scope of the review, its terms and the membership of the review body was never made clear (unlike those of the Commission), although media reports assisted in illuminating these matters,<sup>109</sup> and its scope may have changed over time. In sum, both in terms of the review itself and the wider air services policy environment, there appeared to be no detailed policy guidelines, parameters or benchmarks in place against which, or forming part of a policy framework within which, a decision on the Pacific could be made. That the review was apparently initiated after Qantas raised policy concerns, and cabinet support for the interests of Qantas, would appear to have further prejudiced any decision.

#### **4.4 A note on bilateral agreements between (a) Australia and Singapore; (b) Australia and the US; and (c) Singapore and the US**

As noted earlier, permissions or authorisations with regard to scheduled international air services typically take the form of government-to-government bilateral (and, on occasion, multilateral<sup>110</sup>) air services agreements. It should, however, be understood – with specific reference to the 2005-2006 review of Australia's international air services policy and the government's decision to deny Singapore Airlines access to the Pacific route – that, in order for Singapore Airlines to operate from Singapore to Australia (to Sydney, for example) and then beyond to the US (to Los Angeles, for example), Singapore would need rights from both the US (which are in place) and from Australia (which are not in place and which will not be in place following the result of the 2005-2006 review referred to above) in its respective bilateral agreements with those countries (the US and Australia). So, for example, Singapore Airlines flies from Singapore via Hong Kong and via Seoul to San Francisco, via Tokyo to Los Angeles and via Frankfurt to New York, all with the requisite full traffic rights granted by the US and the respective countries.

Put another way, the ability of Singapore Airlines to fly from Singapore to the US via or beyond an intermediate point – Australia – is governed by the Singapore-Australia bilateral agreement and the Singapore-US bilateral agreement. The US is unable to prevent Singapore Airlines from flying the Australia-US Pacific route<sup>111</sup> (the Singapore-US bilateral agreement contains no restrictions on either frequencies or intermediate points). That ability rests with Australia under the Australia-Singapore bilateral agreement and, again as a result of the 2005-2006 review, it decided not to grant Singapore that (fifth) freedom. In this case the US-Australia bilateral agreement is not material, in the way that the Bermuda II agreement between the US and the UK is not

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<sup>109</sup> See Katharine Murphy, 'Qantas control up in the air', *The Australian*, 26 June 2005; Katharine Murphy, '“Open skies” opens rift among MPs', *The Australian*, 9 November 2005; Katharine Murphy, 'Pacific plan to weaken Qantas', *The Australian*, 30 November 2005; Murphy, *supra*, note 94.

<sup>110</sup> The MALIAT is an example of a multilateral air services agreement (see note 12).

<sup>111</sup> Nor, it appears, would it want to even if it could. For example, the US encouraged Australia to join the MALIAT and, as a result, through participation in that agreement, Singapore Airlines could have operated to the US via Australia.

material with reference, for example, to Air India's service between London and New York.<sup>112</sup>

The sole problem for Singapore Airlines in flying from Singapore to the US via Australia is the position taken by the government not to grant fifth freedom rights to Singapore or, in other words, the government's position with regard to liberalisation of international air services.

## 5 Conclusion: Trading restrictions rather than opportunities<sup>113</sup>

Through an examination and analysis of the Australian government's 2006 decision to deny Singapore Airlines access to the Pacific route, this article has sought to illuminate some of the problems which have attended Australia's international air services policy over the last decade. A number of explanations have been offered for the government's Pacific decision and such explanations, in turn, assist in an understanding not just of that decision but also of the contradictions and inconsistencies in the government's wider air services policy. It is a policy, it has been argued, which confuses the national interest with the interests of the national carrier. That argument is strengthened when one considers the benefits, economic and otherwise, which liberalisation of air services entails, and which have been foregone.

Competition is one result of liberalisation; the government's protection of Qantas on the Pacific route further evidences the wider reality of its air services policy, and the inconsistencies and contradictions inherent in it. It has been and continues to be a policy of trading restrictions rather than opportunities.

Finally, the government's international air services policy may represent a missed opportunity. In many respects Australia has an ideal aviation environment in which to lead the world in terms of international air services 'best practice'. For example, but for relations with Singapore, it has no intractable international air services issues. It is not beset by any real problematic regulatory issues. It has an excellent safety record and an excellent safety regime, and its provision of air traffic control services (through Airservices Australia) leads the world in many respects. Finally, its carriers are comparatively extremely profitable.

Such an environment and such an opportunity were implicitly recognised by the Productivity Commission when it concluded in 1998 that Australia could, amongst other things, invite its neighbours to develop a regional approach to airline designation, promote discussion among WTO members to determine a process for inclusion of air services in the GATS, and 'invite like-minded countries to discuss the formation of an

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<sup>112</sup> The US-Australia bilateral does not restrict a fifth freedom carrier.

<sup>113</sup> In stating that 'the central goal in international aviation should be to move toward a truly competitive system', US President Jimmy Carter argued in favour of being 'bold in granting liberal and expanded access to foreign carriers ... in exchange for equally valuable benefits ... Our policy should be to *trade opportunities rather than restrictions*' (emphasis added): Jeffrey N. Shane, 'Air Transport Liberalization: Ideal and Ordeal', *Second Annual Assad Kotaite Lecture*, Royal Aeronautical Society, Montreal, Canada, 8 December 2005, p. 3.

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open club of nations committed to liberalising international aviation through a common plurilateral open skies agreement.<sup>114</sup> As a result of the government's international air services policy, however, these opportunities have not been realised.

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<sup>114</sup> Productivity Commission, *supra*, note 8, pp. XXXI, XXXVI and XXXIX.