

SENATE STANDING COMMITTEES ON RURAL AFFAIRS AND TRANSPORT

INQUIRY INTO:

- AIR NAVIGATION AND CIVIL AVIATION AMENDMENT (AIRCRAFT CREW) BILL 2011; AND
- QANTAS SALE AMENDMENT (STILL CALL AUSTRALIA HOME) BILL 2011

The Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 (the 'Aircraft Crew Bill')

The stated aim of the Bill is to ensure overseas-based crew who are utilised by Australian airlines are not disadvantaged in comparison to their Australian co-workers. To achieve this, the Bill relies on three regulatory levers:

a) Air Operator Certificates

Air Operator Certificates (AOCs) are issued by the Civil Aviation Safety Authority (CASA) under the *Civil Aviation Act 1988* (the 'CAA') to ensure that airlines servicing the Australian market meet safety requirements. CASA-issued AOCs are required by all airlines (foreign and Australian) providing regular scheduled air services ('Regular Public Transport' operations, or 'RPT') to, from, or within Australia. The only exception to this requirement relates to New Zealand airlines operating under the Trans-Tasman Mutual Recognition framework. In these circumstances, CASA recognises the New Zealand-issued AOC and does not require the New Zealand airline to obtain a CASA-issued AOC.

The Bill provides that all CASA-issued AOCs would be conditional on the AOC holder ensuring that crew working 'in connection' with the AOC holder's RPT operations received 'no less favourable' employment conditions than if they were employed directly by the AOC holder (proposed CAA s28BJ). A similar provision is intended to apply to New Zealand-issued AOCs operating under the Mutual Recognition framework, where the airline is a subsidiary or associated entity of an Australian airline (proposed CAA s28CA).

b) International Airline Licences – Australian airlines

International Airline Licences (IALs) are issued by the Department of Infrastructure and Transport under the *Air Navigation Act 1920* and are the primary regulatory tool for ensuring compliance with the rights granted under bilateral air services arrangements. All airlines (whether Australian or foreign) seeking to operate scheduled international services (including passenger, cargo and code-share services) to or from Australia are required to obtain an IAL.

c) International Airline Licences – foreign subsidiaries

As well as modifying the conditions attached to IALs issued to Australian airlines, the Bill modifies the conditions attached to IALs for airlines that are foreign 'subsidiaries' and 'associated entities' (defined as per *Corporations Act 2001*) of Australian IAL holders.

Scope of commercial arrangements to which the Bill applies

The application of the Bill to "Australian international airlines, their subsidiaries and/or associated entities" potentially covers a wide range of airlines, not all of whom are Australian.

When combined with the use of AOCs and IALs as regulatory levers, the Bill appears to apply to a wide range of relationships involving Australian airlines, including:

- Code-share relationships.
- Subsidiary businesses, in which an airline establishes or acquires a separate but wholly owned subsidiary airline;
- Wet-leasing arrangements, in which an operator leases an aircraft with crew to another airline; and
- Minority shareholdings, in which an airline business purchases a minority stake in another airline business (either Australian or foreign).

As a result, it appears the Bill would require Australian airlines to ensure that crew in a wide range of airlines and business units received wages and conditions comparable to crew employed directly by the Australian airline. This could have far reaching implications for Australian airlines.

It would appear the scope of the Bill could extend to a range of airlines' current activities:

- Virgin Australia's international operations, including its investment in New Zealand-based Pacific Blue Airlines (New Zealand);
- Virgin's alliance with Skywest, in which aircraft are to be wet-leased from Skywest to operate Virgin Australia's regional Australia network;
- Qantas' international freight network, its B737 trans-Tasman operations, and QantasLink domestic services;
- Qantas' extensive code-share network, in which Qantas (in conjunction with 23 other airlines) markets flights to 122 destinations not serviced by Qantas' own aircraft; and
- Air Pacific (Fiji's national airline) and the proposed new-Asian based 'premium' venture.

The Bill is likely to also extend to Jetstar's international operations, affecting Singapore-based Jetstar Asia and the proposed new venture in Japan. To the extent Qantas code-shares on many flights offered under the various Jetstar brands, it would appear many Jetstar crew would also need to be offered Qantas equivalent wages and conditions.

Implications for Australian airlines

Australia's international airlines – like all international businesses – operate in a competitive marketplace. Foreign international airlines may operate under different arrangements including continued government ownership, the presence of government subsidies and support, differing approaches to bankruptcy protection and divergent tax regimes, all of which contribute to market distortions. Divergent industrial relations systems across countries can also lead to significant variations in the underlying cost base for airlines.

The Bill would effectively prevent Australian airlines from taking up investments in overseas countries and would limit the commercial flexibility Australian airlines require to compete effectively with foreign airlines (such as establishing low cost carriers to complement their premium businesses).

In this regard, the Department notes code-sharing is an essential commercial activity pursued by almost all airlines globally. The virtual networks facilitated by code-sharing are important for airlines to extend their network reach without the capital expenditure and risk associated with own-aircraft operations on marginal routes.

Without code-sharing, it is likely Australian airlines would not serve secondary destinations around the world, as the traffic to/from Australia is too small to support own-aircraft services by Australian airlines. In addition, there is likely to be implications for the viability of routes served directly by Australian airlines due to the absence of cross marketing with other airlines.

The Department notes one of the apparent intentions of the Bill is to extend the wages and conditions offered to the crew of Australian airlines to the crew of foreign airlines with which Australian airlines have a commercial relationship (such as code-sharing). This may reduce the opportunities for Australian airlines to enter into code-sharing arrangements.

The Bill may also impact on flights to regional Australia. Both Virgin and Qantas have or are proposing regional flights operated by regional carriers and it would be expected these crews would be subject to different terms and conditions to 'mainline' crew, reflecting the smaller aircraft and shorter flight times involved in these operations.

Other policy considerations

Consistency with international obligations

The Department notes the Bill may raise issues with our obligations under international law as it may be seen as imposing Australian employment conditions extra-territorially and may also be inconsistent with Australia's bilateral air services arrangements.

Fatigue Management

The Department notes that the explanatory memorandum to the Bill raises the issue of fatigue management of crew used by Australian airlines and the requirement for flight and duty time limitations as one of the reasons for the Bill's provisions.

The Department notes the issue of fatigue management was recently considered by the Senate Rural Affairs and Transport References Committee Inquiry and their Report on Pilot Training and Airline Safety.

Since the Committee's report was released new Standards and Recommended Practices (SARPS) for managing fatigue in aviation personnel have been provided to aviation safety regulators around the world by the International Civil Aviation Organization (ICAO).

The Department notes that the Civil Aviation Safety Authority (CASA), Australia's aviation safety regulator, has already initiated a standards development project to complete standards and guidance for fatigue management which will take into account the new and amended SARPS and cover both flight and cabin crew.

The Department supports the completion of this work by CASA as the appropriate way forward in addressing important fatigue management issues for flight and cabin crew.

Regulation of workplace conditions

The Department notes the Bill is intended to "protect the workplace conditions of foreign or overseas-based flight or cabin crew."

The *Civil Aviation Act 1988* and the *Air Navigation Act 1920* are directed at ensuring aviation safety and implementing Australia's rights and obligations within the international framework of aviation regulation. The Department does not believe these frameworks are appropriate as vehicles to achieve other policy objectives relating to the regulation of workplace pay and conditions.

The *Fair Work Act 2009* regulates workplace relations in Australia, and provides for minimum terms and conditions of employment. A submission from the Department of Education, Employment and Workplace Relations addresses issues about the coverage of the Fair Work Act.

The Qantas Sale Amendment (Still Call Australia Home) Bill 2011

Operation of the Bill

The Bill proposes three main changes to the *Qantas Sale Act 1992*:

- it enables shareholders to seek injunctions to enforce the provisions in Qantas' articles of association mandated by the *Qantas Sale Act 1992*(QSA);
- it changes the composition of the Qantas Board;
- it places restrictions on the operations of Qantas, Qantas subsidiaries and associated entities.

Enforcement of the Articles of Association

The QSA enables the Minister for Infrastructure and Transport (who is responsible for Part 3 of the QSA), to seek an injunction to prevent Qantas from engaging in conduct that would be in breach of its mandatory articles of association. The Bill will widen the scope of people eligible to seek injunctions. The Department notes the Bill therefore has the potential to expose Qantas to legal challenges from a range of different sources of potentially different motivations. For example, as drafted the Bill may enable companies it is competing with to launch legal action provided they meet the test of the Bill (i.e. 100 shareholder members or shareholder members who hold at least 5% of the shares in Qantas).

Board composition

The Bill proposes to amend the mandatory articles of association to change the composition of the Qantas Board to require some mandatory qualifications. The Department notes individuals with these qualifications can be appointed to the Board now, subject to approval from shareholders.

Restrictions on the operations of Qantas, Qantas subsidiaries and associated entities

The Bill proposes a new provision which would require the 'majority' of Qantas' 'heavy maintenance' and a 'majority' of 'flight operations and training' 'conducted by or on behalf of Qantas' to be based in Australia. The Department notes these terms do not have a commonly understood meaning, and it is uncertain how these provisions are to be interpreted.

The Bill also puts forward amendments to expand the coverage of the Act to Qantas' subsidiary airlines and airlines associated entities of Qantas. The amendments would require these airlines to:

- base their 'principal operational centre' in Australia in terms of the facilities that are used by the airline for the provision of scheduled international air transport services, and
- conduct a 'majority' of their 'heavy maintenance' and a 'majority' of 'flight operations and training' 'conducted by or on behalf of' the airlines in Australia.

Similar to the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, the application of the Bill to Qantas subsidiaries and associated entities potentially covers a wide range of airlines, not all of whom are Australian. For example, it is likely to apply to:

- Qantas' international investments, such as Fiji's national airline Air Pacific (of which Qantas owns 46%), and the proposed new full service Asian based venture; and
- Qantas' international freight network, in which aircraft are wet-leased from US based Atlas Air, and its trans-Tasman operations, in which aircraft are wet-leased from Jetconnect; and
- the Jetstar group of airlines, including Singapore-based Jetstar Asia, Vietnam-based Jetstar Pacific, and the proposed new venture in Japan.

Implications for Qantas Group

The Bill appears to preclude Qantas from investing in airlines based overseas. This is likely to have a significant impact on Qantas and its plans to grow internationally.

The Department believes the Bill will have the net effect of reducing the participation by the Qantas Group in international aviation rather than providing for an increase in Qantas Group employment opportunities.

Other Policy Considerations

The Bill proposes changes to the mandatory articles of association of Qantas. The Department notes Qantas, as a public company, is still required to complete the process of changing its constitution and the Bill does not address the possibility shareholders could oppose the amendments.

The Department also does not believe it is appropriate to use the Qantas articles of association to impose requirements on third party airlines which Qantas does not control – particularly as an associated entity could conceivably be a foreign airline which Qantas does not control (e.g. Air Pacific).