Senate Rural Affairs and Transport Legislation Committee

Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011

Submission of Department of Education, Employment and Workplace Relations

***Fair Work Act 2009* (FW Act) - coverage of airline crew**

1. The Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill *2011* (the Bill) would amend the *Air Navigation Act 1920* and *Civil Aviation Act 1988* to require holders of Australian international aviation licences (or their subsidiaries or related entities) or holders of air operator certificates to ensure that flight or cabin crew working in connection with their flights but not directly employed by the airline receive the same wages and conditions they would if directly employed by the airline. The Explanatory Memorandum to the Bill indicates that the intention of the Bill is to ensure that crew aboard Australian airlines who are engaged overseas by third parties (or by overseas subsidiaries of Australian airlines) receive the same wages and conditions as their Australian counterparts.

2. The Department is aware of allegations that some foreign-based cabin crew who fly into Australia on international flights subsequently work on Australian domestic flights. Evidence given to the Senate Rural Affairs and Transport References Committee on 25 February 2011 and 31 March 2011 indicated that crew members based in Bangkok and Singapore were employed overseas to work for the Jetstar group of companies. It was alleged that after arriving in Australia on international flights cabin crew work on Jetstar domestic flights before returning overseas on international flights. The Fair Work Ombudsman is currently investigating these allegations.

3. The following information sets out general observations about the application of the FW Act and relevant modern awards in these circumstances, although the Department notes that whether the FW Act applies will depend on the facts of particular cases. In general terms, while foreign-based crew would not be covered by the FW Act while working on international flights that fly in and out of Australia, they may be covered by the FW Act and a relevant modern award while working in Australia on domestic flights.

Application of FW Act

4. The FW Act applies throughout Australia and in the airspace above Australia (this is a principle of statutory construction reflected in s 21(1)(b) of the *Acts Interpretation Act 1901* (the AI Act)). In this context 'Australia' includes the territories of Christmas Island and Cocos (Keeling) Islands as well as Australia's coastal sea (ss 15B and 17(a) of the AI Act). The FW Act also extends beyond Australia in relation to Australian employers and Australian-based employees (Division 3 of Part 1-3 of the FW Act and Division 3 of Part 1-3 of the *Fair Work Regulations 2009* (FW Regulations)).

5. In Australia the FW Act applies to national system employers (ss 14(1), 30D(1) and 30N(1) of the FW Act). National system employers relevantly include:

   - constitutional corporations (trading and financial corporations formed in Australia as well as foreign corporations);
   - employers of flight crew officers (pilots, navigators and flight engineers) employed in connection with interstate and international trade and commerce;
   - employers in the Australian Capital Territory and the Northern Territory; and
   - employers in Victoria, New South Wales, South Australia, Tasmania and Queensland not otherwise covered by the FW Act, as a result of referrals of power to the Commonwealth from those States to extend the FW Act.

6. A national system employee is an employee of a national system employer (ss 13, 30C(1) and 30M(1))).

Foreign crew on domestic flights

7. The FW Act applies principally to employment relationships formed in Australia.

8. Foreign employees engaged outside Australia principally to work overseas, including on international flights to and from Australia, are not covered by the FW Act (see further below). This is consistent with the general principle that the law governing a contract is the law of the place in which the contract is formed. However, work carried out by overseas-based employees on Australian domestic flights can be seen as a separate and distinct part of their engagement that may be covered by the FW Act and relevant modern awards.

9. Where a foreign employer engages employees overseas who come into Australia and work on Australian domestic flights, the employees' work on those flights may be within the scope of the FW Act, because it is employment in Australia of national system employees by a national system employer (assuming the foreign employer is a foreign corporation or other type of national system employer). In these circumstances relevant modern awards may also apply (see below).

10. In *Re Maritime Union of Australia; ex parte CSL Pacific Shipping Incorporated* (2003) 214 CLR 397 the High Court found that a foreign employer does not have to have a physical presence in Australia (other than having its employees working for a time within Australia's territorial limits) for that employer to be subject to Commonwealth legislation.

Minimum conditions of employment

11. Chapter 2 of the FW Act provides for terms and conditions of employment of national system employees. The National Employment Standards provide legislated minimum terms and conditions of employment for all national system employees. Modern awards provide minimum terms and conditions of employment for national system employees in specified industries or occupations.

Modern award coverage of pilots

12. The Air Pilots Award 2010 covers 'employers throughout Australia of air pilots and those employees' that fall within one of the classifications of the award (such as Captains, First Officers and Second Pilots/Officers) (clause 4.1). In addition, the award covers 'any employer which supplies on-hire employees in those classifications' (clause 4.5). 'Employee' and 'employer' are defined in the award to mean, respectively, 'national system employee' and 'national system employer' within the meaning of the FW Act (clause 3.1). 'Pilot' is defined to include a pilot 'operating overseas from a base within Australia on behalf of the operator' (clause 3.1).

13. The expression 'throughout Australia' is not defined in the modern award. However, the ordinary meaning of 'throughout' is 'in or to every part of; everywhere in' (Macquarie Dictionary Online).

14. Overseas, the Air Pilots Award 2010 can only apply to employers and their employees within the definitions of Australian employer and Australian-based employee (ss 34 and 35 of the FW Act and Division 3 of Part 1-3 of the FW Regulations).

Modern award coverage of cabin crew

15. The Aircraft Cabin Crew Award 2010 covers 'employers of aircraft cabin crew and their employees employed throughout Australia in the classifications listed in clause 18' (clause 4.1). In addition, the award covers 'any employer which supplies on-hire employees in classifications set out in clause 18 of the award' (clause 4.5). Clause 18 sets minimum wages for cabin crew members, cabin crew supervisors and cabin crew managers. The award defines 'employee' and 'employer' to mean, respectively, 'national system employee' and 'national system employer' within the meaning of the FW Act (clause 3.1).

16. Overseas, the Aircraft Cabin Crew Award 2010 can only apply to employers and their employees within the definitions of Australian employer and Australian-based employee (ss 34 and 35 of the FW Act and Division 3 of Part 1-3 of the FW Regulations).

Foreign crew on international flights

17. In general terms the FW Act would not be interpreted to apply to persons working in Australia for a short period as an ordinary incident of the work they perform overseas under a foreign contract of employment. In such a case the employment relationship would be covered by the law of the country in which the contract of employment was formed.

18. While the FW Act may regulate the work of foreign employees working on Australian domestic flights, it does not extend to cover foreign employees working on international flights, including when foreign airlines fly directly between two or more points in Australia as part of an international flight to/from Australia.

19. Under Article 17 of the 1944 Convention on International Civil Aviation (the Chicago Convention) an aircraft has the nationality of the State in which it is registered. Under international law, the laws of the State in which an aircraft is registered apply onboard the aircraft, even when the aircraft enters the airspace of another State. Article 13 of the Chicago Convention (which provides for the application of laws relating to admission to and departure from another State's territory) is implemented in Australia by s 16 of the *Air Navigation Act 1920*. However, neither the Chicago Convention nor s 16 of the *Air Navigation Act 1920* support the application of the FW Act to the pilots and crew of foreign airlines.

20. The Department of Infrastructure and Transport (DIT) has advised that Australia's bilateral air services agreements generally do not permit foreign airlines to operate regular domestic flights within Australia. However, air services arrangements between Australia and New Zealand (NZ) permit NZ airlines to operate dedicated domestic flights within Australia under the Single Aviation Market and mutual recognition provisions. DIT advises that foreign carriers may be granted authorisation to operate domestic services in Australia in exceptional circumstances (although this is rare), for example, when domestic services are temporarily unavailable or to operate routes not currently serviced by scheduled domestic airlines. Airlines intending to operate foreign-registered aircraft on Australian domestic flights must obtain authorisation from the Civil Aviation Safety Authority (Section 27A of the *Civil Aviation Act 1988*). Again, there is an exception in the case of NZ airlines.

21. DIT advises that bilateral air services agreements generally provide for foreign airlines to serve more than one point in Australia as part of the same flight (for example Los Angeles-Sydney-Melbourne) and also often provide for foreign airlines to exercise own stopover rights – that is, the right to carry their own international passengers between points within another country.

22. The FW Act should not be interpreted as applying to pilots and crew of foreign airlines operating between two or more points in Australia as part of an international flight, as this would impermissibly interfere with the jurisdiction of another State.

23. A distinction can therefore be drawn between a foreign employee who comes to Australia to perform work as an ordinary incident of the work they perform for their foreign employer overseas (such as on a foreign airline flying into Australia and operating between two points in Australia as part of an international flight) and a foreign employee who performs an identifiably separate task (such as on an Australian domestic flight) in Australia. Only in the latter circumstance would the FW Act apply.