



28 May 2004

Mr Phillip Bailey
Acting Secretary
Senate Legal & Constitutional Committee
Room S1.61, Parliament House
CANBERRA ACT 2600

Dear Mr Bailey

Submissions to the Inquiry into the provisions of the Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004

We refer to your inquiry into the provisions of the *Civil Aviation Amendment (Relationship with Anti-Discrimination Legislation) Bill 2004* ('Bill').

Submissions

1. Qantas supports the introduction of the Bill

Qantas Airways Limited ('Qantas') supports the purpose of the Bill to amend the *Civil Aviation Act 1988* to empower the Governor General to make regulations that may be inconsistent with the *Disability Discrimination Act 1992* ('DDA') and the *Sex Discrimination Act 1984* ('SDA'), and to validate existing regulations and past actions based on those regulations.

As a domestic and international airline carrier, Qantas is bound to comply with aviation safety regulations and standards, including the *Commonwealth Civil Aviation Act 1988*, the *Civil Aviation Regulations 1988*, the *Commonwealth Civil Aviation Safety Regulations 1998*, and the *Commonwealth Civil Aviation Orders* (together, 'Civil Aviation Legislation').

It is clear that there are circumstances in which the requirements of aviation safety may conflict with disability and sex discrimination laws. It is essential, in Qantas' view, that the Governor General be able to make valid aviation safety regulations which are inconsistent with this discrimination legislation.

Under the current regime, there are various examples of conflicts between the *Civil Aviation Regulations 1988* and the *Civil Aviation Safety Regulations 1998* and the discrimination legislation. To the extent that such regulations are invalid, Qantas supports the retrospective validation of such regulations.

It is important that the necessity for inconsistency between the Civil Aviation Legislation and State and Commonwealth discrimination legislation, in order to ensure the safety of air transport, be recognised and addressed.



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Qantas considers that the Bill appropriately limits the scope of the power to make inconsistent regulations as the power is confined to circumstances where the inconsistency is necessary for the safety of air transport.

2. Conflict between the Civil Aviation Legislation and State and Commonwealth Discrimination legislation should be resolved

However, in Qantas' submission, the Bill only takes the first step in what should be a two step process to appropriately address the conflict between the Civil Aviation Legislation and State and Federal discrimination legislation, principally, the DDA. The second step would be to ensure that direct compliance with the Civil Aviation Legislation was an exemption to the general provisions prohibiting discrimination on the ground of disability and sex.

Compliance with airline safety requirements, as required under the Civil Aviation Legislation, regularly imposes requirements that conflict with the terms of State and Commonwealth disability discrimination legislation. In Qantas' experience, this is particularly so with respect to the terms of the DDA.

Qantas' experience is that passenger complaints are made and disability discrimination commission complaints initiated, pursuant to the terms of the DDA by Qantas customers, in relation to circumstances where Qantas is simply complying with its obligations under the Civil Aviation Legislation, for example in relation to the obligation not to seat disabled passengers in exit row seating.

However, under the current regime, compliance with the Civil Aviation Legislation does not provide Qantas with a clear defence to claims of disability discrimination.

Section 47(2) of the DDA provides an exemption from the operation of the DDA in relation to an act that is done by a person in direct compliance with a '*prescribed law*'. However, the Civil Aviation Legislation is not a '*prescribed law*' for the purposes of section 47, pursuant to Regulation 2A and Schedule 1 of the *Disability Discrimination Regulations 1996* ('**DDA Regulations**').

As a result, in responding to complaints, Qantas is forced to rely on satisfying the 'unjustifiable hardship' defence to a claim by a passenger based on disability discrimination, pursuant to section 11 of the DDA, in circumstances where Qantas is simply complying with its obligations under the Civil Aviation Legislation. While this is, in many circumstances, considered an adequate response to the complaint (although only after considerable time and costs have been invested by Qantas), it would be preferable that Qantas be able to simply rely on the section 47(2) exemption in answer to such complaints.

On this basis, Qantas submits that the Civil Aviation Legislation, or at least the *Civil Aviation Regulations 1988* and *Civil Aviation Safety Regulations 1988*, should be included as a '*prescribed law*' for the purposes of section 47 of the DDA and the DDA Regulations.

That framework would still provide appropriate protection under the disability discrimination legislation on the basis that to establish that it fell within the exemption, a respondent would have to be able to demonstrate that the act complained of was necessary in order to comply with the Civil Aviation Legislation. In the decision of the High Court in *Waters v Public Transport Corporation* (1991) 173 CLR 393, Dawson and Toohey JJ said:

'If it were necessary for the respondent to commit acts of discrimination in order to carry out the specific directions of the Minister for Transport or the Director-General of Transport, then by virtue of section 39(e)(ii), those acts would not be unlawful, but if there were a discretion as to the manner in which the specific directions might be carried out which offered a choice between discrimination and no discrimination, the adoption of discriminatory means would be afforded no protection by section 39(e)(ii).'' (emphasis added).

Qantas submits that the Civil Aviation Legislation should be a 'prescribed law' for the purposes of section 47(2) of the DDA.

In relation to the SDA, there is no comparable exemption available in relation to 'direct compliance with laws'. Further, there is no 'unjustifiable hardship' defence available to respondents who are forced to make decisions which may be otherwise unlawfully discrimination on the ground of sex in order to comply with the Civil Aviation Legislation. Qantas submits that a similar exemption be included in the SDA in order to allow direct compliance with the Civil Aviation Legislation.

3. **Clauses 6A and 6B should refer to "air transport" rather than "air navigation"**

Qantas submits that the proposed clauses 6A and 6B (to be inserted into subsection 98(6)) should not be restricted to the inconsistencies necessary for the safety of "air navigation", but should instead refer to "air transport". The reference to air navigation (as opposed to air transport) provides opportunity for further argument as to whether the issues raised in relation to the carriage of passengers within the cabin of the aircraft (such as exit row seating and aircraft design issues), rather than issues relevant only to the navigation of the aircraft, are intended to come within the amendment. The Second Reading Speech confirms that the Amendment Bill is intended to remove inconsistencies that may arise in relation to any of these issues referred to above and accordingly, Qantas submits that the broader phrase of "air transport" should replace the term "air navigation".

If you have any queries in relation to Qantas' submissions, would you please contact Alison McKenzie on (02) 9691 5621.

Yours faithfully


Wes Nobelius
Deputy General Counsel