

Chapter 1

Background of the Bills

Introduction

1.1 This inquiry reviewed and reported on two bills before the Senate: the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 (the Aircraft Crew Bill) and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011 (the Qantas Sale Amendment Bill).

1.2 The Aircraft Crew bill was introduced to the Senate on 17 August 2011 by Senator Nick Xenophon. The Aircraft Crew Bill proposes amendments to the *Air Navigation Act 1920* and the *Civil Aviation Act 1988*. The bill was referred to the committee for inquiry on 18 August 2011.

1.3 The Qantas Sale Amendment Bill was introduced to the Senate on 25 August 2011 by Senator Nick Xenophon and Senator Bob Brown. The Qantas Sale Amendment Bill seeks to amend the *Qantas Sale Act 1992*. On 14 September 2011, the Senate Selection of Bills Committee referred the Qantas Sale Amendment Bill to the Rural Affairs and Transport Committee for inquiry and report by 2 November 2011.

1.4 The committee decided to extend the reporting date to 21 November 2011 and inquire into the Qantas Sale Amendment Bill and the Aircraft Crew Bill concurrently. The reporting date was subsequently extended date to 22 March 2012.

Conduct of the inquiry

1.5 The committee provided information about the inquiry on the committee's website and advertised the inquiry in *The Australian* newspaper on 31 August 2011 (following the referral of the Aircraft Crew Bill) and again on 28 September 2011 (following the referral of the Qantas Sale Amendment Bill). Following the referral of each bill the committee wrote to stakeholders to invite submissions.

1.6 The committee received 14 submissions (including one *in camera* submission) which are listed in Appendix 1. The committee held three public hearings in Canberra on 4 November 2011, 24 November 2011 and 6 February 2012. A list of witnesses is included in Appendix 2 and Hansard transcripts are posted on the committee's website.

1.7 In January 2012, the committee agreed to post draft amendments to both bills proposed by Senator Xenophon on the committee's website and call for public comment. It also wrote to relevant stakeholders asking for supplementary submissions regarding this material. The committee received five supplementary submissions regarding the draft amendments.

1.8 The draft amendments were introduced into the Senate on 13 March 2012 with an additional clause compared to the amendments posted on the committee website. The comments made in submissions to the inquiry refer to the draft amendments as posted on the committee website in January 2012.

Acknowledgements

1.9 The committee is thankful to those organisations and individuals that made submissions and to witnesses who appeared at the public hearings for the contribution they have made to the inquiry.

A note on references

1.10 The references in this report are made to individual submissions that were received by the committee. The references to the Hansard made in this report are of the proof transcript and page numbers between it and the official transcript may vary. The Hansard transcripts of the committee's hearings and all public submissions made to the inquiry can be found on the committee's website.

Scrutiny of Bills Committee

1.11 The Senate Standing Committee for the Scrutiny of Bills considers whether bills before the Senate trespass unduly on personal rights and liberties and related matters. The Senate Standing Committee for the Scrutiny of Bills made no comment on either bill considered in this inquiry.

Overview of the Aircraft Crew Bill

1.12 The Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 will require that Australian airlines and their subsidiaries provide pay and conditions for overseas-based flight and cabin crew operating on their flights that are no less favourable than if they were directly employed by the Australian airline. As outlined in the Explanatory Memorandum to the bill, the inquiry was to consider issues of safety (including fatigue), pay and working conditions and the effect on Australian jobs due to the use of overseas-based crew by Australian airlines and their subsidiaries.¹

1.13 In order to achieve its objectives, Schedule 1 of the bill amends the *Air Navigation Act 1920* to place a new condition on the international aviation licences held by Australian airlines or the subsidiaries or associated entities of Australian airlines. The bill seeks to add two new sections, 16A and 16B, to the *Air Navigation Act 1920* as follows:

Section 16A applies to international licences held by Australian airlines. It states that a condition of the licence is that the licence holder must ensure

1 *Explanatory Memorandum, Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011*, pp 2–3.

that flight crew and cabin crew who are not directly employed by the licence holder and who are working in connection with an international flight operated by the airline, must receive wages and conditions that are no less favourable than they would have received if they were directly employed by the airline.

Section 16B applies to international licences held by subsidiaries or associated entities of an Australian airline, as defined by the *Corporations Act 2001*. It states that a condition of the licence is that the licence holder must ensure that flight crew and cabin crew working in connection with an international flight operated by the licence holder to and/or from Australia receive wages and conditions of employment that are no less favourable than if they had been directly employed by the Australian airline in control of the subsidiary or associated entity.²

1.14 In addition, Schedule 2 of the bill seeks to amend the *Civil Aviation Act 1988* to place a new condition on all new and existing Air Operator's Certificates (AOCs). It does this by creating a new section 28BJ for the Act:

...which states that it is a condition of an AOC that the holder of the AOC must ensure that any flight or cabin crew working in connection with the regular operations of the airline and who are not directly employed by the airline receive wages and conditions that are no less favourable than they would have been if the crew had been directly employed by the airline.³

1.15 Finally, the bill also seeks to amend certain New Zealand AOC holders' conditions by adding a new section 28CA to the *Civil Aviation Act 1988*:

...which applies to New Zealand AOCs with ANZA privileges, where the New Zealand AOC belongs to a subsidiary or associated entity of an Australian airline (as defined in the *Corporations Act 2001*). This section states that ANZA privileges will not be granted by Australia unless the holder of the AOC ensures that all flight crew and cabin crew working in connection with the regular operations of the airline receive wages and conditions that are no less favourable than they would have received if they were directly employed by the Australian airline controlling the subsidiary or associated entity.⁴

Overview of the Qantas Sale Amendment Bill

1.16 The Qantas Sale Amendment (Still Call Australia Home) Bill 2011 seeks to amend the *Qantas Sale Act 1992*. The bill proposes a number of changes to Qantas' articles of association to add a number of new requirements regarding Qantas'

2 *Explanatory Memorandum, Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, pp 2–3.*

3 *Explanatory Memorandum, Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, p. 3.*

4 *Explanatory Memorandum, Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, p. 3.*

operations and the make-up of the Qantas board, as discussed below. The bill also inserts a definition for 'associated entity' into the Act, in line with section 50AAA of the *Corporations Act 2001*.

1.17 A main feature of the bill is to change some of the requirements for Qantas regarding the location of its facilities, training and maintenance operations. The bill seeks to achieve this by omitting '(for example, facilities for the maintenance and housing of aircraft, catering, flight operations, training and administration)' from paragraph 7(1)(h) from the *Qantas Sale Act 1992*, and inserting the following provisions after 7(1)(h):

- (ha) require that Qantas ensure that, of the facilities, taken in aggregate, which are used by Qantas subsidiaries and any associated entities in the provision of scheduled international air transport services, the facilities located in Australia, when compared with those located in any other country, must represent the principal operational centre for the subsidiary or associated entity; and
- (hb) require that the majority of heavy maintenance of aircraft and the majority of flight operations and training conducted by, or on behalf of, Qantas is conducted in Australia; and
- (hc) require that the majority of heavy maintenance of aircraft and the majority of flight operations and training conducted by, or on behalf of, Qantas subsidiaries and any associated entities is conducted in Australia.⁵

1.18 The bill also seeks to add certain experience and expertise requirements to the make-up of the Qantas board of directors. After paragraph 7(1)(i) of the *Qantas Sale Act 1992*, the bill adds the conditions for Qantas board membership:

...that at least one of the Directors of Qantas has a minimum of 5 years' professional flight operations experience and that at least one of the Directors has a minimum of 5 years' aircraft engineering experience.⁶

1.19 Currently the *Qantas Sale Act* only allows an application to the Court for injunctions by the Minister. The bill seeks to extend this to allow for applications to the Court by 100 shareholder members or shareholder members who hold at least 5 percent of the shares in Qantas. To achieve this, the bill adds the following amendment to both subsection 10(1) and 10(2) of the *Qantas Sale Act 1992*:

After "application of the Minister," insert "100 shareholder members or shareholder members who hold at least 5% of the shares in Qantas,".⁷

5 Qantas Sale Amendment (Still Call Australia Home) Bill 2011.

6 *Explanatory Memorandum*, Qantas Sale Amendment (Still Call Australia Home) Bill 2011, p. 2.

7 Qantas Sale Amendment (Still Call Australia Home) Bill 2011.

1.20 The above change creates clause 5 and clause 6 of the Qantas Sale Amendment Bill, respectively. According to the bill's Explanatory Memorandum this will have the following implications:

Clause 5 provides that the Court may, on the application of the Minister, 100 shareholder members or shareholder members who hold at least 5 percent of the shares in Qantas, restrain Qantas from engaging in particular conduct, such as a contravention of mandatory articles (section 7 of the Act) or section 9 (which requires Qantas to maintain a register of shares in which foreign persons have a relevant interest), and require them to do a particular act or thing.

Clause 6 provides that, if Qantas or any other person has refused or fail to comply with the mandatory articles under section 7 of the Act, the Court may, on the application of the Minister, 100 shareholder members or shareholder members who hold at least 5 percent of the shares in Qantas, require Qantas or that person to do that particular act or thing.⁸

Draft amendments proposed by Senator Xenophon

1.21 In January 2012, the committee posted draft amendments to the two bills under inquiry on the committee website and wrote to relevant stakeholders to call for comment. The due date for the submissions was set at 6 February 2012. The discussion below is based on the draft amendments as they appear on the committee's website. Those amendments were the basis for the additional evidence provided to the inquiry.

1.22 The new amendments to the Aircraft Crew Bill would replace all the bill's previously proposed amendments to the *Air Navigation Act 1920* and the *Civil Aviation Act 1988* regarding workplace relations issues with proposed amendments to the *Fair Work Act 2009*.

1.23 To achieve this the draft amendments would substitute the existing schedule 1 of the Aircraft Crew Bill with a new schedule 1 making the following changes to the *Fair Work Act 2009*:

1 Section 12 (after the definition of *agreed to*)

Insert:

aircraft operating crew means any person who:

- (a) is on board an aircraft with the consent of the operator of the aircraft; and
- (b) has duties in relation to the flying or safety of the aircraft; and

includes a person:

- (c) who is conducting a flight test; or

8 *Explanatory Memorandum, Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, pp 2–3.

(b) who is conducting surveillance to ensure that the flight is conducted in accordance with the regulations; or

(c) who is in the aircraft for the purpose of:

(i) receiving flying training; or

(ii) practising for the issue of a flight crew licence.

2 Section 12 (after the definition of *Australian-based employee*)

Insert:

Australian domestic aviation means activities conducted in Australia in the support or conduct of commercial aviation operations that carry passengers whose flight begins and finishes at an aerodrome located in Australia.

Note: In this context, *Australia* includes the Territory of Christmas Island and the Territory of Cocos (Keeling) Islands (see paragraph 17(a) of the *Acts Interpretation Act 1901*).

3 Section 12 (after the definition of *Australian-based employee*)

Insert:

Australian domestic aviation operator means the person, organisation or enterprise engaged in, or offering to engage in, Australian domestic aviation.

4 Section 12 (definition of *flight crew officer*)

Repeal the definition.

5 After section 13

Insert:

13A Extended meaning of *national system employee* in relation to *Australian domestic aviation*

For the purposes of this Act, any non-national system employee performing work in Australian domestic aviation is taken to be a national system employee.

6 Subparagraph 14(1)(d)(i)

Repeal the subparagraph, substitute:

(i) aircraft operating crew; or

7 At the end of subsection 14(1)

Add:

or (g) an Australian domestic aviation operator who directly benefits from work performed in Australian domestic aviation by a non-national system employee, regardless of the absence of a direct employment relationship.⁹

1.24 There is also a new amendment proposed to the *Civil Aviation Act 1988* under the Aircraft Crew Bill requiring Air Operator's Certificate (AOC) holders to implement fatigue management systems for cabin and operating crew by 30 June 2012, for flight crew by 31 December 2012, and various other staff by 30 June 2013. To achieve this the draft amendment would omit items 1 to 3 of schedule 2 of the

Aircraft Crew Bill and substitute a new section 28BJ into the *Civil Aviation Act 1988* as follows:

28BJ Management of fatigue

(1) The holder of an AOC must at all times monitor and manage fatigue-related safety risks, based on scientific principles and knowledge as well as operational experience, and take all reasonable steps to ensure that relevant personnel are performing at adequate levels of alertness.

(2) The holder must have a system for management of fatigue-related safety risks for cabin crew and other operating crew in place by 30 June 2012.

(3) The holder must have a system for management of fatigue-related safety risks for flight crew in place by 31 December 2012.

(4) The holder must have a system for management of fatigue-related safety risks for operational support staff, including but not limited to schedulers, dispatchers, flight operations managers and continuing airworthiness managers, in place by 30 June 2013.¹⁰

1.25 The draft amendments put forward by Senator Xenophon to the Qantas Sale Amendment Bill focus on definitional changes in order to clarify the intent of the bill. The two key terms are ‘associated entity’ and ‘exercising Australian rights’ which would be defined as follows:

associated entity means an entity that satisfies subsection 50AAA(2) or (3) of the *Corporations Act 2001*.

1.26 And:

exercising Australian rights means using capacity allocated under an air services agreement to fly to, from or within Australia or to fly between two or more foreign countries using Australian allocated capacity other than code-share capacity.

1.27 As a result, the following changes (labelled (3) and (4)) to the bill are proposed:

(3) Schedule 1, item 3, page 3 (lines 13 to 19), omit paragraph 7(1)(ha), substitute:

(ha) require that Qantas ensure that, of the facilities, taken in aggregate, which are used by Qantas subsidiaries and any associated entities exercising Australian rights in the provision of scheduled international air transport services, the facilities located in Australia, when compared with those located in all other countries, must represent the principal operational centre for the subsidiary or associated entity; and

(4) Schedule 1, item 3, page 3 (lines 23 to 26), omit paragraph 7(1)(c), substitute:

(hc) require that the majority of heavy maintenance of aircraft and the majority of flight operations and training conducted by, or on behalf of, Qantas

10 Draft Amendments, Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011.

subsidiaries and any associated entities exercising Australian rights are conducted in Australia.¹¹

1.28 The new amendments circulated in the Senate on 13 March 2012 largely reflect the draft amendments above. There was the inclusion of an additional change to the Qantas Sale Amendment Bill, amendment 4, which according to the Explanatory Memorandum:

...amends the existing paragraph 7(1)(hb) to clarify that it applies to flight operations management, rather than to flight operations as a whole.¹²

1.29 This was also reflected in amendment 5 which proposes to qualify 7(1)(hc) in a similar way.¹³

Structure of the report

1.30 The report consists of three chapters. This first chapter outlines the conduct of the inquiry and provides an overview of the Aircraft Crew Bill and the Qantas Sale Amendment Bill. It also outlines the draft proposed amendments put forward by Senator Xenophon as part of the inquiry. Chapter 2 is the main body of the report and considers the provisions of each bill and the committee's view in this regard. In addition, this chapter examines a number of key issues that were developed in the broader context of the inquiry, including the events and decisions surrounding Qantas' grounding of its entire fleet of aircraft on 29 October 2011. Chapter 3 of the report provides the committee's conclusions and the recommendations that neither the Aircraft Crew Bill nor the Qantas Sale Amendment Bill be passed.

11 Draft Amendments, Qantas Sale Amendment (Still Call Australia Home) Bill 2011.

12 *Supplementary Explanatory Memorandum for Amendments*, Qantas Sale Amendment (Still Call Australia Home) Bill 2011, p. 1.

13 *Supplementary Explanatory Memorandum for Amendments*, Qantas Sale Amendment (Still Call Australia Home) Bill 2011, p. 1.