

**Civil Aviation Safety Authority Submission
to the
Senate Standing Committee on Rural Affairs and Transport
Legislation Committee**

***Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew)
Bill 2011; Qantas Sale Amendment (Still Call Australia Home) Bill 2011***

Background: the Civil Aviation Safety Authority and its role in the regulation of Australian aviation safety.

1. The Civil Aviation Safety Authority (CASA) was established as a statutory authority under the *Civil Aviation Act 1988* (the Act) on 6 July 1995.¹
2. The main object of the Act is to ‘*establish a regulatory framework for maintaining, enhancing and promoting the safety of civil aviation, with particular emphasis on preventing aviation accidents and incidents*’.²
3. As specified in subsection 9(1) of the Act, CASA’s core function is to conduct the safety regulation of civil air operations in Australian territory and the operation of Australian aircraft outside Australian territory by, amongst other things:
 - developing and promulgating appropriate, clear and concise aviation safety standards;
 - developing effective enforcement strategies to secure compliance with aviation safety standards;
 - issuing certificates, licences, registrations and permits;
 - conducting comprehensive aviation industry surveillance, including assessment of safety-related decisions taken by industry management at all levels for their impact on aviation safety;
 - conducting regular reviews of the systems of civil aviation safety in order to monitor the safety performance of the aviation industry, to identify safety-related trends and risk factors and to promote the development and improvement of the system; and
 - conducting regular and timely assessments of international safety developments.
4. CASA also has the following safety-related functions:
 - encouraging a greater acceptance by the aviation industry of its obligation to maintain high standards of aviation safety; and

¹ Section 8.

² Section 3A

- promoting full and effective consultation and communication with all interested parties on aviation safety issues.³
5. In exercising its powers and performing its functions under the Act, CASA must regard the safety of air navigation as the most important consideration.⁴
 6. Subject to its obligations under the Act to ensure that primacy is given to the safety of air navigation, CASA also has a range of functions and powers under the *Airspace Act 2007* related to the administration and regulation of Australian administered airspace.
 7. CASA implements its obligations under the Act by and through:
 - the Civil Aviation Regulations 1988 (CARs);
 - the Civil Aviation Safety Regulations 1998 (CASRs);
 - the Civil Aviation Orders (CAOs); and
 - Manuals of Standards.⁵
 8. CASA publishes a wide range of practical guidance and advisory materials, including Civil Aviation Advisory Publications and Advisory Circulars, to better enable members of the aviation industry to understand and fulfil their safety-related obligations under the legislation. CASA also produces safety promotion materials and conducts safety education seminars throughout Australia.
 9. Consistent with its consultative functions under subsection 9(2) of the Act, and where it is otherwise appropriate to do so, CASA is expressly required to consult with government, commercial, industrial, consumer and other relevant bodies and organisations, including the International Civil Aviation Organization (ICAO) and bodies representing the aviation industry in the performance of its functions and the exercise of its powers.⁶

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

10. CASA understands that the Rural Affairs and Transport Legislation Committee (the Committee) will be inquiring into two separate bills, the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011.

³ Civil Aviation Act, subs. 9(2).

⁴ Civil Aviation Act, subs. 9A(1).

⁵ As part of the regulatory reform process, the CARs are being progressively replaced by the CASRs. More detailed technical requirements under the CARs (and in some cases, under certain provisions of the Act) appear in the CAOs. Where such detailed requirements are required under the CASRs these appear in corresponding Manuals of Standards.

⁶ Civil Aviation Act, sec. 16.

11. As CASA does not have any functions under the *Air Navigation Act 1920* and because the proposed changes to the Air Navigation Act do not relate specifically to aviation safety, CASA offers no comment on the proposal to amend the Air Navigation Act.
12. Neither does CASA offer comments on such underlying issues (if any) as may generally affect the legality or constitutionality of the proposed legislation.
13. Schedule two of the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill proposes to amend the Civil Aviation Act to place a new condition on all new and existing Air Operator's Certificates (AOCs) for the purpose of protecting the workplace conditions of foreign or overseas-based flight or cabin crew who are working for Australian-owned airlines or their subsidiaries⁷ through the addition of a new section of the Civil Aviation Act which provides:

It is a condition of an AOC to which this section applies that the holder of the AOC must ensure that flight crew and cabin crew working in connection with regular public transport operations of the holder of the AOC, and who are not directly employed by the holder of the AOC, receive wages and conditions of employment that are no less favourable than they would have received if they had been directly employed by the holder of the AOC.

CASA as a Safety Regulator

14. As mentioned above, when exercising its powers and functions under the Act, CASA must regard the safety of air navigation as the most important consideration.⁸ Indeed, one of the primary objectives of the Parliament in establishing CASA as an independent statutory authority was to ensure that the Government authority with sole responsibility for conducting safety regulation in respect of Australian aviation would not be compromised in that endeavour by the existence of actual, potential or perceived competing priorities or interests.
15. The primacy of the safety of air navigation is reinforced in the Government's National Aviation Policy. This policy states that maintaining and improving safety and security is the first priority for the Australian Government.⁹ This commitment is further reinforced in the Minister for Infrastructure and Transport's Statement of Intent to the Board of CASA, which emphasises the need for CASA to perform its functions in a manner that ensures aviation safety remains the highest priority.

Air Operator's Certificates

16. One of the primary means by which CASA regulates the entry of an operator into the Australian civil aviation system is through the granting of an AOC. An AOC is

⁷ As stated in the Explanatory Memorandum to the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011.

⁸ Civil Aviation Act, subs. 9(2).

⁹ *National Aviation Policy White Paper: Flight Path to the Future*, Commonwealth of Australia, 2009, p ii.

a permission granted by CASA under Section 27 of the Civil Aviation Act to conduct commercial activities prescribed in the Civil Aviation Regulations 1988 (CAR). It is an offence under the Civil Aviation Act to undertake such commercial activities without an AOC.

17. Section 28 of the Civil Aviation Act provides that CASA must issue an AOC if, but only if, it is satisfied with a number of safety-related considerations in respect of the applicant and the applicant's organisation. This section expressly emphasises CASA's obligation to have regard to the safety of air navigation as its most important consideration in assessing an applicant for an AOC (and in determining whether the holder of an AOC continues to satisfy applicable requirements). In issuing an AOC, and in determining whether a person may continue to hold an AOC, CASA must be satisfied that:

- the applicant's organisation is suitable to ensure that the AOC operations can be conducted or carried out safely, having regard to the nature of the AOC operations;
- the organisation's chain of command is appropriate to ensure that the AOC operations can be conducted or carried out safely;
- the organisation has a sufficient number of suitably qualified and competent employees to conduct or carry out the AOC operations safely;
- key personnel in the organisation have appropriate experience in air operations to conduct or to carry out the AOC operations safely;
- the facilities of the organisation are sufficient to enable the AOC operations to be conducted or carried out safely;
- the organisation has suitable procedures and practices to control the organisation and ensure that the AOC operations can be conducted or carried out safely.

The Addition of a Workplace Relations Function to CASA's role

18. The effect of adding the condition to AOCs proposed by the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill would be to require CASA to take on a workplace relations regulatory role in addition to its safety regulation functions. For several reasons, this is a highly problematic proposition.

19. First, given the priority that must be given to the safety of air navigation, CASA is seriously concerned that the addition of a workplace relations function would oblige CASA to become involved in negotiations between AOC holders and their employees on pay and working conditions. CASA recognises that the sensitive and sometimes highly charged circumstances under which workplace-related negotiations and industrial action of various kinds take place may give rise to a need for increased surveillance and oversight of AOC operations. In such circumstances, it would be extremely difficult for CASA to maintain the confidence of all of those whose safety-related activities CASA is responsible for regulating. The perception of CASA as an independent safety regulator could be

compromised if it were to become involved in vetting the pay and working conditions of AOC holder's employees.

20. Second, the primacy of CASA's safety-related obligations could be diluted or compromised by a new industrially oriented obligation. Neither CASA nor its predecessors has had any direct role in regulating matters related to pay and/or working conditions for either domestic aircraft crew who work under Australian workplace legislation, or international crew who work under the workplace rules of other countries. Neither does CASA currently have the expertise or capability to attend to these kinds of issues with a requisite level of competence and understanding.
21. Third, even assuming the skills necessary to address and consider issues of the kind contemplated by the proposed amendment could be marshalled from amongst CASA's personnel, it would be necessary for CASA to realign its resources considerably, and in a way that would necessarily involve a diversion of those resources currently dedicated to critical safety-related oversight, surveillance, assessment and associated enforcement functions.
22. Alternatively, adoption of the functions contemplated by the proposed amendment would require recruitment of a significant number of personnel with backgrounds, training and experience in industrial relations, with attendant costs that would have to be recovered either through additional charges on industry, increases in appropriated funds, or both.
23. Fourth, as a practical matter and as a matter of law alike, AOC operations require that the conditions under which the crew members of an aircraft carry out their activities must be compatible with their responsibilities under the Civil Aviation Act. Thus, it would be neither practicable as a matter of safety, nor permissible as a matter of law, for a term of employment governing an aircraft crew member, such as flight and duty times, to be inconsistent or incompatible with requirements specified in or under the Civil Aviation Act.
24. It is not clear to CASA that any demonstrable safety gains would result from the adoption of an amendment of the kind proposed in a legislative regime of which the primary purpose is aviation safety.
25. The proposed amendment invites complex and unprecedented conflicts in relation to the regulatory management of AOCs when pay and conditions are in dispute. Under the current wording of the amendment, CASA could, in certain cases, be left with no option but to refuse to issue (or to cancel) an AOC, on the basis of protracted, unresolved pay and conditions negotiations between the operator (or prospective operator) and its employees. Such a result could hardly be desirable for an employer, employees, shareholders in the relevant company or companies and in many cases, for the flying public.
26. Ambiguities in the meaning of the undefined expressions 'no less favourable', 'working in connection with', 'not directly employed' and even 'directly employed', as these appear in clause 1 of Schedule 2 of the proposed legislation, open the door to unbounded contention and debate, as does the provision in the proposed

new section 28BJ, which characterises *flight and duty time limitations*—as these critical considerations arise and are dealt with under the civil aviation legislation for decidedly safety-related purposes—as specified ‘conditions of employment’.

27. Assuming, for the sake of discussion, there was an agreed understanding of the terms and concepts mentioned immediately above, it is unclear as to why CASA should have a role in regulating flight crew and cabin crew who are *not* directly employed by the holder of the AOC, but not those crew members who *are* directly employed by the AOC holder. This raises both legal and practical concerns.

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

Issues of safety (including fatigue)

28. CASA is not aware of any negative safety trends in relation to foreign or overseas based crew used by Australian AOC holders.
29. CASA currently regulates flight and duty times for flight crew under Part 48 of the Civil Aviation Orders. This prescriptive legislation also allows for operators to obtain approved exemptions from its provisions by adopting alternative:
- prescriptive limitations contained in Standard Industry Exemptions; or
 - Fatigue Risk Management Systems (FRMS) based on articulated safety cases.
30. For some time, CASA has been considering the most appropriate approach to updating the CAOs governing flight and duty time limitations. This effort has intensified as more sophisticated and demonstrably effective methods of fatigue management have become available. Further progress has been awaiting the development of standards on fatigue management by the International Civil Aviation Organization (ICAO), on the basis of which Australian requirements might be harmonised with recognised international best practices.
31. On 15 July 2011, Australia received notification of an amendment to the ICAO Annex material on fatigue management for flight and cabin crew. In its letter advising States of amendments to the relevant Annex to the Chicago Convention incorporating these new fatigue management provisions, ICAO’s Secretary General said:

For some years now, several operators in various parts of the world have acted on evidence that fatigue risk managements systems (FRMS) can provide better safety outcomes than current prescriptive flight and duty regulations while allowing greater operational flexibility. However, where these operators have used this non-prescriptive approach to fatigue risk management, both they and their State have done so in the absence of international Standards and Recommended Practices (SARPs). To date, there has been no consistent and global understanding of what an FRMS is,

*how it should be implemented, or how its oversight should be conducted. Together, the SARPs and the guidance material provide the clarity and direction that will allow States and operators to take full advantage of the safety and operational benefits afforded by FRMS. They will facilitate both the development and implementation of an FRMS by operators and the assessment and monitoring of FRMS by regulators.*¹⁰

32. CASA has established a project team and working group under the auspices of its Standards Consultative Committee, dedicated to the development of a regulatory framework consistent with the recently adopted ICAO standards¹¹. The working group includes representatives of airline operators and flight and cabin crew employee associations alike. Working together with CASA, these representatives will consider the amended SARPs, along with a review of applicable legislation, standards and policies. The objectives of the project are to:

- review the amended ICAO SARPs (as specified in Annex 6 to the Chicago Convention) relating to fatigue management;
- review current CASA standards, as specified under CAR 5.55 and in Part 48 of the Civil Aviation Orders, and CASA's associated policies relating to the management of fatigue;
- propose appropriate amendments to the civil aviation legislation, standards and policies with the goal of achieving a regime that takes account of ICAO recommendations and contemporary, scientifically-based principles, knowledge and experience in fatigue management; and
- to provide essential elements of a comprehensive approach to the management of fatigue risks in critical areas of aviation operations.

33. The Fatigue Risk Management Systems project will be undertaken in two phases. The first phase will consider the implications of fatigue in relation to flight crew. The second phase will consider the fatigue risks in relation to cabin crew. The standards and guidance developed in this process will govern all flight and cabin crew engaged in operations involving Australian aircraft.

Issues of pay and working conditions and the effect on Australian jobs due to the use of overseas-based crew by Australian airlines and their subsidiaries

¹⁰ ICAO State Letter AN 11/1.3.24-11/44 (11 July 2011).

¹¹ The Standards Consultative Committee (SCC), which was established by CASA to bring together CASA technical experts and representatives from a diverse range of aviation industry groups to work jointly during the development and consultative phases of regulatory material. Aviation community experts nominated by the SCC work together with CASA staff in subordinate groups (SCC sub-committees, project teams and working groups) on the detailed development of new and amended regulatory material. The SCC is currently comprised of 39 organisations and industry groups. There is a combined total of over 200 CASA and industry participants in the SCC and its six subcommittees.

34. As said, CASA does not currently have a role in regulating workplace relations, such as pay and conditions, in connection with AOC operations. Neither does CASA have a part to play in the direct regulation of the employment of personnel by AOC holders, beyond the specific authority CASA may and does exercise in connection with the safety-related aspects of these matters under the civil aviation legislation.
35. As specified in subsection 9(3) of the Civil Aviation Act, CASA's tertiary-level function¹² of promoting the development of Australia's civil aviation safety capabilities, is expressly formulated as a *safety-focussed objective*.¹³ It does not contemplate objectives involving the promotion or development of Australia's civil aviation capabilities more generally, from either a commercial or industrial perspective.
36. In conclusion, CASA is of the view that the proposed amendments to the Civil Aviation Act have the very real potential to seriously undermine CASA's ability to concentrate its regulatory and other efforts on, and to deploy its limited resources with a view to better ensuring, the safety of Australian aviation.

Qantas Sale Amendment (Still Call Australia Home) Bill 2011

37. CASA understands that this bill will, amongst other things, amend the *Qantas Sale Act 1992* to require that the majority of heavy maintenance of aircraft, flight operations and Qantas training is conducted in Australia.
38. CASA does not have a view on where Qantas maintenance, flight operations or flight training should take place as long as the organisations conducting these activities hold the appropriate approvals to undertake the maintenance, flight operations or flying training activity, and maintain compliance with the applicable regulatory requirements.
39. While AOC holders may lawfully outsource many of the aspects of their operational and maintenance-related functions, they may not outsource their responsibility and accountability for the safety of their operations.
40. The Civil Aviation Act expressly provides that 'the holder of an AOC must at all times take all reasonable steps to ensure that every activity covered by the AOC, and everything done in connection with such an activity, is done with a reasonable degree of care and diligence.'¹⁴

¹² CASA's functions are specified hierarchically in section 9 of the Civil Aviation Act, with its primary, safety-related *regulatory functions* set out in subsection 9(1), its secondary, *other safety-related functions* set out in subsection 9(2), and certain *other tertiary functions* set out in subsection 9(3).

¹³ Civil Aviation Act, para 9(3)(e).

¹⁴ Section 28BE.