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Advancing the interests of our members and the profession

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16 January 2012

Committee Secretary
Senate Standing Committees on Rural Affairs and Transport
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Secretary,

Re: Supplementary Submission from AIPA

The Australian and International Pilots association (AIPA) has been represented at all of the hearings thus far held by the Committee. As the members are aware, AIPA has briefly appeared and we are very appreciative of that opportunity.

However, the constraints of time for hearings are such that AIPA remains concerned that some issues may have been diverted by the very appropriate scrutiny afforded to the practices of one group of operations. We are also disappointed that it appears that none of the respondent entities, that is Qantas (and Virgin to a lesser extent) and the various Government instrumentalities chose to examine the effects of our proposed amendments.

AIPA requests the indulgence of the Committee to consider this Supplementary Submission.

Our intention is to offer the Committee suggested amendments to the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011*, provide a copy of our IASC submission to which we referred in testimony and, for completeness, reiterate our proposed amendments to the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011*.

Yours Sincerely,

Richard Woodward
Vice-President
Australian and International Pilots Association

aipa

Advancing the interests of our members and the profession

TO THE AUSTRALIAN SENATE

Rural Affairs and Transport Legislation Committee

Australian and International Pilots Association Supplementary Submission

Air Navigation And Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011

12 January 2012

WHO IS AIPA/AUSALPA?

AIPA Affiliations

The Australian and International Pilots Association (AIPA) is a member organisation of the umbrella pilot representative body for Australia, AusALPA, and a member association of the International Federation of Airline Pilots' Associations (IFALPA). In the global context, IFALPA represents in excess of 100,000 pilots through over 100 aircrew organisations. IFALPA is recognised as a permanent observer to the ICAO Air Navigation Commission and, as such, participates fully in the technical deliberations of the Commission and ancillary Panels and Study Groups.

AIPA is also a partner of the OneWorld Cockpit Crew Coalition whose principal objective is to provide a co-operative forum for its member organisations to address matters of common interest affecting pilots within the airline companies who comprise the oneworld Alliance (currently Qantas, Aer Lingus, American Airlines, British Airways, Lan Chile, Iberia, Cathay Pacific, Finnair, Japan Airlines, Malev Hungarian Airlines and Mexicana) and their major codeshare partners.

AIPA's Role

AIPA seeks to advance the employment interests of its members and, to that end, represents individuals and the membership at large both in the workplace and in the broader aviation industry. In addition to being the social welfare voice of our membership, AIPA has a broader interest in the welfare of all Australian pilots and, through our work with IFALPA, the interests of pilots worldwide.

AIPA also provides passionate advocacy on safety and technical issues, both locally and internationally. AIPA regularly participates in regulatory, technical and government inquiries and forums, and is recognised by various government and quasi-government bodies as having a stakeholder interest in the Australian aviation industry.

There are many issues that arise in aviation that are often resolved without input from representative bodies such as AIPA. Some are matters that are not appropriate for representative body involvement and AIPA recognises and respects that circumstance. However, there are many other matters where the views and inputs of organisations such as AIPA, which are free of vested financial interests and not aligned with any commercial entities or business coalitions, can provide broad non-partisan advice and add significant value to both the process and the outcomes.

This Supplementary Submission

This Supplementary Submission to the Australian Senate Rural Affairs and Transport Legislation Committee sets out AIPA's further suggestions for amending the Bills which are the subject of the current Inquiry into *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011.*

Enquiries should be directed in the first instance to:

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AUSTRALIAN AND INTERNATIONAL PILOTS ASSOCIATION

SUPPLEMENTARY SUBMISSION TO THE AUSTRALIAN SENATE RURAL AFFAIRS AND TRANSPORT LEGISLATION COMMITTEE

ON THE

AIR NAVIGATION AND CIVIL AVIATION AMENDMENT (AIRCRAFT CREW) BILL 2011

AND THE

QANTAS SALE AMENDMENT (STILL CALL AUSTRALIA HOME) BILL 2011

INTRODUCTION

The Australian and International Pilots association (AIPA) has been represented at all of the hearings thus far held by the Committee. As the members are aware, AIPA has briefly appeared and we are very appreciative of that opportunity.

However, the constraints of time for hearings are such that AIPA remains concerned that some issues may have been diverted by the very appropriate scrutiny afforded to the practices of one group of operations. We are also disappointed that none of the respondent entities, that is Qantas (and Virgin to a lesser extent) and the various Government instrumentalities chose to examine the effects of our proposed amendments.

AIPA requests the indulgence of the Committee to consider this Supplementary Submission.

Our intention is to offer suggested amendments to the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011*, provide a copy of our IASC submission to which we referred in testimony and, for completeness, reiterate our proposed amendments to the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011*.

OUR MOTIVATION

We believe it is important to restate our motivation in making our various submissions. It has proved to be very easy to polarise these debates in the public eye as either "union bashing" or "being bashed by unions". Unfortunately, that risks the loss of important public scrutiny of the many issues involved in the background of these Bills. Those issues will have significant effect on the future aviation industry in Australia.

In our primary submission, we said:

> "…AIPA is highly motivated to see Qantas succeed in a business sense so that we, directly, and more broadly the rest of Australia, benefit from that success. However, AIPA, in combination with what we believe to be the majority of the Australian public, is committed to see the success of this great Australian business take place with the minimum leakage of contributions to the Australian public purse, employment, skills development, national infrastructure and the national reach in time of emergency.
>
> AIPA is particularly aware that Qantas and its employees live in a dynamic and changing world of aviation as well as a changing world of business. We offer our considered advice to the Committee against the backdrop of the national interests of prosperity, influence and security for all Australians."

We chose initially to not comment on the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011* in deference to an expectation that other representative bodies may more effectively pursue the issues. Unfortunately, that has not been the case. AIPA has many concerns about the practices first brought to light in the preceding Inquiry conducted by the Rural Affairs and Transport References Committee, both from the perspective of protecting the interests of vital members of our aircraft crew and of preventing the exploitation foreign workers who lack adequate representation and protection.

In a more general sense, AIPA has a duty to raise issues where we believe that policy, procedures or activities are dangerous, illegal or just "sharp practice". It is inevitable that our raising of these issues will be critical of certain people and organisations, but that is the price of restoring the integrity of the system. It is not our intention to cause harm, particularly in the case of our employer, but rather to highlight to a management team that "knows the cost of everything but the value of nothing" that investment in quality remains a pathway to success.

AIR NAVIGATION AND CIVIL AVIATION AMENDMENT (AIRCRAFT CREW) BILL 2011

Background

The Report of the Senate Rural Affairs and Transport References Committee *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, published on 23 June 2011, included commentary on the use on domestic flights by Jetstar of cabin crew who are foreign nationals employed offshore. For simplicity, we will refer to these foreign-based foreign national cabin crew as "foreign-based". The domestic sectors in question are so-called "tag" flights that purport to be the continuation of an international flight. Evidence given to that Inquiry indicated that these foreign-based cabin crew were employed under substantially different conditions of service to their Australian counterparts, including different rostering rules.

Despite the publicity surrounding the employment conditions of these foreign-based cabin crew, further allegations have arisen about the use of foreign-based cabin crew on domestic sectors that are not part of a continuous duty period that includes an international sector entering or leaving Australia. Evidence given to the current Inquiry confirming the use of foreign-based cabin crew on domestic sectors from Darwin[1] directly contradicts Mr Bruce Buchanan, Group CEO Jetstar Group, who previously advised the References Committee:

> "**Senator O'BRIEN** - So, obviously, the international crew overnight at the end of the destination and then go back on a subsequent flight?
>
> **Mr Buchanan** - Yes. They will overnight in Melbourne or Sydney and then may work another international sector. They stay on the international network and eventually will end up back in Bangkok or Singapore." [2] [emphasis added]

AIPA is concerned about the apparent level of enquiry that Jetstar conducted before utilising Thai and Singaporean cabin crew on domestic sectors:

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1 Ms Neeteson-Lemkes, Senate Committee Hansard, Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, 04 November 2011, page 63

2 Mr Bruce Buchanan, Senate Committee Hansard, Rural Affairs and Transport References Committee *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, 25 February 2011, page RA&T 30

> **"Senator O'BRIEN**—Is any special dispensation required for international crew to operate on the domestic tag leg?
>
> **Mr Buchanan**—I am unaware of any special dispensation."[3] [emphasis added]

Perhaps Mr Buchanan chose not to further explain the extent of any due diligence that Jetstar may have conducted or any concerns that the management may have had before authorising the domestic activities of the foreign-based cabin crew.

Potential Immigration Issues

As AIPA best understands the rules relating to the temporary visa known as a Crew Travel Authority (CTA) under which the foreign-based cabin crew enter and temporarily reside in Australia, the CTA does not permit those crew members to work other than in connection with the particular international flights on which they enter and leave Australia. Further, we believe that foreign-based cabin crew would be required to hold at least one of the special employer-sponsored visas that allow temporary work.

AIPA expects that Jetstar would be unable to gain approval for such employer sponsorship. Although aeroplane and helicopter pilots are listed in the "Employer Nomination Scheme – Occupations, Locations, Salaries, and Relevant Assessing Authorities" legislative instrument[4] published by the Department of Immigration and Citizenship (DIAC), cabin crew are not. We understand that the absence of a listing would generally be fatal to an employer's aspirations to gain the most common form of temporary work visa, the Temporary Business (Long Stay) - Standard Business Sponsorship (Subclass 457) visa[5], known most commonly as a "457 visa". 457 visas allow temporary work for periods ranging from one day to 4 years.

Even if Jetstar had contemplated seeking 457 visas to allow its foreign-based cabin crew to work domestically, an immediate and obvious problem would have presented itself. That problem is the Government policy position that led to the *Migration Legislation Amendment (Worker Protection) Act 2008* which introduced a number of measures:

> "…to enhance the framework for the sponsorship of non-citizens seeking entry to Australia. The bill is designed to preserve the integrity of the Australian labour market and ensure that the working conditions of sponsored visa holders meet Australian standards."[6]

The Second Reading speech should also have rung some alarm bells:

> "…Community confidence in the scheme suffered under the previous government following a series of well publicised abuses of workers on Subclass 457 visas.
>
> The negative perception of the Subclass 457 visa program is a very serious problem for the employers and industries that rely heavily on it.

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3 Mr Bruce Buchanan, Senate Committee Hansard, Rural Affairs and Transport References Committee *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, 25 February 2011, page RA&T32

4 *Migration Regulations 1994* – Specification under paragraph 5.19(2)(i), subparagraphs 5.19(2)(h)(i), 5.19(2)(h)(ii), 121.211(b)(ii), 856.213(b)(ii), sub-subparagraphs 121.211(b)(i)(A) and 856.213(b)(i)(A) - Employer Nomination Scheme - Occupations, Locations, Salaries and Relevant Assessing Authorities – June 2011, Comlaw F2011L01228

5 Department of Immigration and Citizenship, *Visas, Immigration and Refugees* at http://www.immi.gov.au/skilled/skilled-workers/sbs/how-the-visa-works.htm (accessed 12 December 2011)

6 Explanatory Memorandum, *Migration Legislation Amendment (Worker Protection) Bill* 2008, page 2

> The economy desperately needs access to temporary skilled labour, but this is only sustainable if the community is confident that temporary overseas workers are not being exploited or used to undermine local wages and conditions…"[7]

Even if sponsorship for 457 visas was possible, the obligations imposed on the sponsoring employer would have rendered such an option cost neutral *vis à vis* employing Australian cabin crew. The most obvious is:

> "The standard business sponsor must ensure that the terms and conditions of employment provided to a primary sponsored person are no less favourable than the terms and conditions the person provides, or would provide, to an Australian citizen or Australian permanent resident to perform work in an equivalent position in the person's workplace at the same location."[8]

Prima facie, it appears that the utilisation by Jetstar of foreign-based cabin crew on domestic sectors is problematic in terms of the intentions of the immigration laws of Australia. AIPA believes that proposals to utilise foreign-based foreign national flight crew are similarly flawed and that DIAC should move immediately to clarify the relevant immigration policy.

Fair Work Issues

Compounding the issue is the potential application of the *Fair Work Act 2009* to the foreign-based cabin crew. AIPA is concerned that the Submission[9] of the Department of Education, Employment and Workplace Relations (DEEWR) was at best equivocal about the application of the *Fair Work Act 2009* to the foreign-based cabin crew.

While the Submission was broadly concerned with the likely extra-territorial application of Australian working conditions as a consequence of the drafting of the Bill, the key issue of the rules governing the domestic sectors appears to be a function of the characterisation of the particular sector between Australian ports:

> "3. …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."[10] [emphasis added]
>
> …
>
> "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."[11] [emphasis added]

AIPA, while noting the difficulty that DEEWR faces when determining the threshold of "principally to work overseas", strongly believes that operating on domestic sectors is

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7 Senator Ludwig, Senate Hansard, 24 September 2008, page 5421

8 Department of Immigration and Citizenship, *Visas, Immigration and Refugees* at http://www.immi.gov.au/skilled/skilled-workers/sbs/obligations-employer.htm (accessed 12 December 2011)

9 Department of Education, Employment and Workplace Relations, Submission 9 to the Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, undated

10 *Ibid*, page 1

11 *Ibid*, page 2

distinctly different from operating on international sectors. We do not distinguish those sectors on the basis of the nature of the work performed, but rather in the context of the labour market within which it is performed - a distinction we believe is entirely consistent with the policy intentions of the *Migration Legislation Amendment (Worker Protection) Act 2008*.

Unfortunately, the evidence given to the Committee by the DEEWR confirmed to AIPA that the current provisions of the *Fair Work Act 2009* appear to be inadequate to resolve the issues:

> "**Senator GALLACHER:** So, if there was a a hub which was servicing Asia, established by timetabling and scheduling, but due to curfew periods—for argument's sake—there was an opportunity to operate that aircraft domestically and they used international crew on that, would that escape the system as we currently have it?
>
> **Mr Kovacic:** I really cannot give you a definitive answer. All I can say is that you need to look at the specifics of each particular instance and form a judgment.
>
> **Senator GALLACHER:** What is very clear is that, if you are operating domestically in Australia, you are covered by the Fair Work Act?
>
> **Mr Kovacic:** I do not think you can put it that black and white. I think what you can—
>
> **Senator GALLACHER:** So if you are an Australian—
>
> **Mr Kovacic:** If the travel, in terms of domestic, is incidental, arguably, potentially, you are not covered. But, equally, if it is replacing, if I can put it that way, domestic aircraft, it could be covered by the Fair Work Act.
>
> **Senator GALLACHER:** 'Could'? 'Maybe'? It is not clear. You are not able to give us any advice on that?
>
> **Mr Kovacic:** All I can say is that work carried out by overseas based employees on Australian domestic flights, if it can be seen as a separate and distinct part of their engagement, can be covered by the Fair Work Act and relevant modern awards, and that is a direct quote from paragraph 8 of the department's submission.
>
> **CHAIR:** What the hell does that mean?
>
> **Senator FISHER:** You have to look at the whole work circumstances—don't you, Mr Kovacic—to make a decision. You cannot just—
>
> **Mr Kovacic:** I think the point I was making is that you would really need to look at the facts of each particular situation.
>
> **Senator FISHER:** Yes, in their entirety. You cannot just pull out a couple of legs that might look like they are domestic." [12]

In the circumstances, AIPA believes that the Bill in its current form casts too wide a net in trying to prevent the exploitation of foreign employees and that foreign airlines can legitimately be removed from that net. The DEEWR submission acknowledges advice from the Department of Infrastructure and Transport (DIT) that foreign airlines are generally not permitted to operate domestic sectors (known as cabotage). AIPA agrees that:

> "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."[13]

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12 Department of Education, Employment and Workplace Relations, Senate Committee Hansard, Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, 24 November 2011, page 19

13 Department of Education, Employment and Workplace Relations, Submission 9, *Op cit*, page 3

The debate needs to be refocused on the primary issue of domestic sectors operated by Australian international airlines and the employment conditions of the crew.

In the absence of a specific definition in Australian legislation that determines the beginning and end points of an international service, AIPA suggests that the embarkation of the first passenger whose flight begins and finishes at an aerodrome located in Australia marks the end of an inbound international flight and, similarly, the disembarkation of the last passenger whose flight begins and finishes at an aerodrome located in Australia marks the beginning of an outbound international flight. Conversely, the carriage of any passenger whose flight begins and finishes at an aerodrome located in Australia is to be considered as domestic carriage.

A further issue that the DEEWR evidence did little or nothing to clarify was that of enforcement of the *Fair Work Act 2009* against foreign corporations. AIPA is most concerned about the possibility that the simple artifice of interposing a foreign employment entity between the Australian employer and the foreign employee may serve to protect the Australian employer from any enforcement action while, for all intents and purposes, the foreign employment entity is practically beyond reach.

AIPA believes that this effective indemnification of the Australian employer who directly benefits from the work of the foreign employee is best undone by a "deeming" or "see through" provision that treats the Australian employer as if there was no interposed foreign employment entity.

AIPA agrees with the DIT position:

> "*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 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."[14]

We therefore recommend that the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011* be amended to target the *Fair Work Act 2009* as the appropriate vehicle to provide the necessary protections to avoid the exploitation of foreign crew members. Schedule 1 should be repealed and replaced with a new "Schedule 1 - Amendment to the *Fair Work Act 2009*" that gives effect to the following scheme:

1. The definition of ***flight crew officer*** should be repealed and replaced by a definition of ***Aircraft operating crew*** that reflects the Civil Aviation Regulations 1988 definition of 'operating crew":

   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.

   Note This definition includes persons:

   (a) who are conducting flight tests; or

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[14] Department of Infrastructure and Transport, Submission 8 to the Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, undated

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

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

(i) receiving flying training; or

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

2. Two new definitions should be inserted that clarify the reach of the scheme. The definition is deliberately broad and includes maintenance and other activities:

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*).

Australian Domestic Aviation Operator means the person , organisation, or enterprise engaged in, or offering to engage in, an Australian Domestic Aviation operation.

3. A new section 13A should be inserted in Division 3:

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

Any non-national system employee performing work in Australian Domestic Aviation shall be deemed to be a national system employee.

4. Section 14 'Meaning of *national system employer'* should be amended by repealing and replacing subparagraph 14(1)(d)(i) to refer to an 'aircraft operating crew' member and inserting a new paragraph (g) that is intended to limit the scope of the deeming by a 'direct benefit' proximity test:

(g) an Australian Domestic Aviation Operator who directly benefits from the work performed by a non-national system employee in Australian Domestic Aviation, regardless of the absence of a direct employment relationship.

We see the 'direct benefit' test as being limited to work performed on or in a aircraft or in any other support activity that, other than for an interposed employment entity, might usually be performed by a direct employee of the operator. AIPA does not intend "direct benefit" to include code-share or other multi-user arrangements but does intend that the test would apply to "virtual airlines' and single user arrangements such as 'wet' leases and charters.

AIPA believes that the scheme outlined above will more effectively address the issue of the exploitation of foreign workers without affecting *bona fide* international operations or foreign operators. We accept that the special case of the Australia-New Zealand arrangements may require further scrutiny, although we do not believe that those arrangements were enacted to permit significant distortions of the normal Australian labour markets.

Fatigue Issues

AIPA was surprised to read in the Civil Aviation Safety Authority (CASA) submission that:

> "CASA is not aware of any negative safety trends in relation to foreign or overseas based crew used by Australian AOC holders."[15]

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15 Civil Aviation Safety Authority, Submission 3 to the Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, undated, page 6

The Report of the Senate Rural Affairs and Transport References Committee *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, published on 23 June 2011, acknowledged evidence of fatigue-related issues and expressed concern about the way the issues were being handled:

> "4.33 The committee considers that claims by airline operators that flight duty extensions are 'industry standard' are unacceptable and CASA's attitude to fatigue management supervision is woefully inadequate…"[16]

Since that Report was published, there has been a continuing stream of anecdotal evidence to suggest that fatigue related issues for cabin crew have not disappeared as the CASA submission implies. Furthermore, evidence has been provided to this Inquiry that nothing has changed within Jetstar and the fatigue risk for cabin crew has remained unmitigated.[17]

CASA indicated on 24 November 2011 that they were following up on the fatigue-related issues raised in evidence to this Committee on 04 November 2011. At the same time, CASA indicated that the implementation schedule for fatigue risk management guidelines had slipped for pilots but not for cabin crew and would be in place by the middle of 2012:

> **"Mr McCormick:** … yes, we have received the guidelines and, yes, we have started to form the working groups. We are taking slightly longer with the flight crew than we thought. That will be early 2012 rather than the end of November 2011, and we are still on track for the middle of the year of 2012 for the cabin crew." [18]

AIPA believes that this timetable is extremely optimistic if the process is to include a set of scientifically-based prescriptive rules , as required by ICAO. For example, Annex 6 'Operation of Aircraft' at Part 1 "International Commercial Air Transport — Aeroplanes" requires:

> **"4.10 Fatigue Management**
>
> 4.10.1 The State of the Operator shall establish regulations for the purpose of managing fatigue. These regulations shall be based upon scientific principles and knowledge, with the aim of ensuring that flight and cabin crew members are performing at an adequate level of alertness. Accordingly, the State of the Operator shall establish:
>
> a) regulations for flight time, flight duty period, duty period and rest period limitations; and
>
> b) where authorizing an operator to use a Fatigue Risk Management System (FRMS) to manage fatigue, FRMS regulations."

We believe that the existing prescriptions in Part 48 of the Civil Aviation Orders and the Standard Industry Exemptions are not scientifically-based and extensive and intensive work will be required to make them so. CASA has consistently maintained that the cabin crew fatigue measures will be completed after the flight crew provisions:

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16 Senate Rural Affairs and Transport References Committee, Report of the *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010*, 23 June 2011 at http://www.aph.gov.au/Senate/committee/rat_ctte/pilots_2010/report/index.htm (accessed 12 December 2011), page 111

17 Ms Neeteson-Lemkes, *Op cit.*, page 62

18 Civil Aviation Safety Authority, Senate Committee Hansard, Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, 24 November 2011, page 24

> **"Mr Hood:** I suppose our resources in the regulator that are experienced and skilled in the fatigue area are currently devoted to the working group working with the unions and operators in relation to the flight crew rules. As soon as we have got those in a shape to put out to public consultation, we will be starting to work on the flight attendant rules." [19]

AIPA clearly has a vested interest in ensuring that the future rules for fatigue management of pilots are appropriate and developed without delay. However, we also recognise that cabin crew have no legislated fatigue management protection, while the pilot community at least has the existing prescriptions and a much stronger and active representation in safety matters. Accordingly, we believe that CASA should review its approach to its planned process for cabin crew fatigue management guidelines:

> **"Senator XENOPHON:** There is nothing to stop CASA from enacting a temporary cabin crew fatigue management scheme, is there?
>
> **Mr McCormick:** At this stage, if we were to do that, we would seriously divert resources from completing the fatigue risk management scheme for pilots."[20]

AIPA believes that an interim prescription is an appropriate option. For example, CASA could propose that cabin crew be limited to rostered duties no greater than that permitted for pilots under Parts II and III of the Standard Industry Exemptions. It should be noted that this proposal is made for simplicity rather than science, since the Exemptions reflect the very limited knowledge of fatigue mechanisms and mitigators that existed at the time of their development in late 1990. The following table shows the normal rostered duty limits, which can be extended by up to 2 hours at the Captain's discretion[21]:

Local start time	**Sectors**						
	1&2	**3**	**4**	**5**	**6**	**7 +**	
0500 - 0559	13	12	12	11	11	10	
0600 - 1259	14	13	12	12	11	10	maximum hours per flight duty period
1300 - 1459	13	12	12	11	11	10	
1500 - 0459	12	11	11	10	10	9	

We believe that few operators would be adversely effected and, if any were to claim so, then it would require little to investigate an accommodation. Existing industrial arrangements that provide lesser duty periods would be undisturbed and AOC holders with effective fatigue risk management schemes would be unaffected. AIPA does not believe that an interim solution such as this would represent a significant diversion of CASA resources.

Notwithstanding, AIPA agrees with Senator Xenophon that something more positive must be done. Unfortunately, we agree with both DIT and CASA that the approach set out in the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011* is not the appropriate use of the legislation as proposed. However, the specific subject of fatigue management is very much a suitable topic for the *Civil Aviation Act 1988*.

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19 *Ibid*, page 24

20 *Ibid*, page 25

21 Civil Aviation Safety Authority, Standard Industry Exemption to CAO 48 Part III , at http://www.casa.gov.au/scripts/nc.dll?WCMS:STANDARD::pc=PC_90320, accessed 12 December 2011

AIPA suggests that the stated intentions of CASA should be reinforced by a requirement placed on operators to manage fatigue risk in operating crew and support staff in safety-sensitive positions. Although progress is now apparent in the regulatory reform task, it is indisputable that the process has been excessively protracted. We believe that imposing milestone requirements on CASA would have little effect, whereas imposing them on operators as a condition of an Air Operator's Certificate (AOC) will increase the pressure on CASA to make good on their intentions.

We therefore recommend that the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011* be amended to target the *Civil Aviation Act 1988* as the appropriate vehicle to impose fatigue risk management requirements on operators. Schedule 2 should be repealed from line 5 onwards and an amended s28BJ should be inserted as follows:

28BJ Management of Fatigue

(1) The holder of an AOC must at all times monitor and manage fatigue-related safety risks, based upon 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.

The dates have been chosen to reflect the need to protect cabin crew with some urgency, given the current absence of protection and the established propensity of some operators to exploit that regulatory vacuum, followed by an orderly progression for flight crew and related occupations making safety-sensitive decisions.

AIPA SUBMISSION TO THE INTERNATIONAL AIR SERVICES COMMISSION IN REGARD TO THE QANTAS APPLICATION FOR RENEWED AND REVISED CAPACITY ALLOCATIONS

On Friday 28 October 2011, AIPA made a submission to the International Air Services Commission (IASC) in regard to an application by Qantas for renewed and revised capacity allocations. The submission was referred to in evidence to this Committee:

> "**Senator XENOPHON:** But is there not a consumer rights issue here that people like flying Qantas because of the training of its pilots, the service and its impeccable safety reputation? If you buy what you think is a Qantas ticket, but you are actually flying on another airline—a subsidiary either wholly owned by Qantas or even minority owned or with a minority share—is that something you have considered in the context of how that would work? I do not know whether Captain MacKerras wants to answer that.
>
> **Capt. MacKerras:** I was just going to say that we have made a separate submission to the International Air Services Commission with regard to the request from Qantas for renewal of several of their capacity determinations. We have raised the issue with IASC that we are concerned about some aspects of the consumer consequences of code sharing. That was particularly raised in the context of international code sharing. We suggested that they need to follow their normal provisions, which may require them to go to the ACCC and re-examine the issues surrounding 'code sharing within your own group on your own subsidiaries'. Also, whether the standing provision that exists in almost all of the determinations, which says you

make your best endeavours to identify the code share carrier—what it fails to do is identify not only the name of the code-share carrier but that the carrier that you are actually travelling on, the operating carrier, may have different operating standards, training standards and service standards et cetera from the marketing carrier who sold you the ticket."[22]

We have attached the IASC submission to this document in support of the above exchange. The main concerns expressed by AIPA in that submission are:

> "AIPA is concerned that the true competitiveness of the parent-subsidiary corporate capacity and code sharing arrangements permitted by paragraphs 2(e) and 2(ea) of s15 of the *IASCA 92* has not been fully explored in current market conditions.
>
> AIPA is concerned that the parent-subsidiary corporate capacity and code sharing arrangements are providing a vehicle for Qantas management to avoid the intent of the *QSA 92* and to shrink Qantas in favour of Jetstar for reasons other than market conditions.
>
> AIPA is concerned that the level of disclosure required by the IASC about code-sharing between full-service and low cost carriers is inadequate and may lead operators to breach some or all of sections 18, 29 and 34 of the Australian Consumer Law."

AIPA can now report that the Executive Director of the IASC advised us on 11 November 2011 that the IASC has not forwarded our concerns to the Australian Competition and Consumer Commission (ACCC), presumably because our concerns were not of a level deemed necessary ("serious concerns") to trigger the procedural provision.

QANTAS SALE AMENDMENT (STILL CALL AUSTRALIA HOME) BILL 2011

In the interests of simplifying consideration of our proposed amendments, as well generating further input from the relevant agencies and operators, we will reiterate from our primary submission our proposed amendments to the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011*:

> "AIPA applauds Senators Xenophon and Bob Brown for attempting to address the facilities protection clauses, the experience requirements for the Board and the ability for members to seek injunctive relief.
>
> ### Aggregated Facilities
>
> AIPA notes the concern raised at the 2007 Inquiry that the use of the term "any country" in subsections 7(1)(h) and the proposed (ha) may be interpreted as being satisfied by a comparison of the facilities of each foreign country with those in Australia in isolation from the total aggregated overseas facilities. Such an interpretation may well lead, in time, to the Australian facilities becoming only a small part of a multinational offshore conglomerate. That is counter to what we believe is the necessary national interest provision to keep Qantas Australian.
>
> AIPA suggests that replacement of "any other country" with "all other countries" would clarify the original intent.

---

22 Australian & International Pilots Association, Senate Committee Hansard, Senate Rural Affairs and Transport Legislation Committee *Inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011 and the Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, 04 November 2011, page 50

Subsidiaries and Associated Entities

AIPA finds itself in a vexed situation with regard to subsidiaries[23] and associated entities[24].[25]

In the first instance, we do not believe that the *QSA 92* was enacted with the thought of a subsidiary consuming the parent. In the second, we recognise that modern airline economics support the provision of "no frills" services as an alternative to (but not replacement of) full service airlines. In the third instance, we represent a majority of the pilots in each of the Qantas entities domiciled in Australia that are internally competing for operational employment, despite having not been engaged in the advent of the subsidiaries. Lastly, we recognise, with some reservations, the business sense in engaging in emerging markets through subsidiaries and associated entities such as Jetstar Japan.

We initially supported the inclusion of 'associated entities' to pick up those entities that were effectively controlled by Qantas as a minority shareholder but fell short of the definition of a 'subsidiary'. However, AIPA now recognises that the scope of the *Corporations Act 2001* definition is broader than practically required to curb 'shelling out' and 'offshoring' behaviours. We recognise that it would be unreasonable to impose constraints on minority joint ventures where compliance is impractical and, in some foreign countries, potentially illegal.

In consideration of emerging market investments, AIPA has formed the view that off-shore entities that operate internationally, other than to and from Australia or operating 'behind' or 'beyond' flights using Australian designated capacity, are not in any practical sense replacing Australian jobs. Further, we consider that the 'aggregated facilities' clause sufficiently constrains the diversion of excessive amounts of capital that would otherwise be available to grow the Australian business.

AIPA therefore considers that the facilities protection clause in the proposed subsection 7(1)(ha) and the services protection clause in the proposed subsection 7(1)(hc) would be satisfied if three modifications were made:

1. the proposed definition for 'associated entity' in subsection 3(1) is modified to refer only to entities that satisfy subsections 50AAA(2) and (3) of the *Corporations Act 2001*, i.e. those entities over which Qantas exerts control[26];
2. a new definition is included in subsection 3(1) of "**exercising Australian rights** means using capacity allocated under an Australian or foreign 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"; and
3. the phrase "exercising Australian rights" is inserted following "any associated entity" in subsections 7(1)(ha) and (hc).

---

23 See Section 46 of the *Corporations Act 2001*

24 See Section 50AAA of the *Corporations Act 2001*

25 The definition of 'associated entity' includes subsidiaries, but we have chosen to retain the redundant expressions for clarity in situations not directly linked to the Corporations law.

26 See Section 50AA of the *Corporations Act 2001*

Further Amendment

In considering how best to deal with the issue of international subsidiaries being used to 'shell out' Qantas International, AIPA believes that there needs to be some form of balancing mechanism developed that prevents Qantas management from withdrawing, for all intents and purpose, all investment in Qantas for the benefit of subsidiaries and associated entities. Given that AIPA believes that the plethora of subsidiaries and associated entities were created despite the intent of the *QSA 92*, we do not support reciprocal protection for those other bodies.

We recognise that the relative demand for full service and no-frills international operations within the available Australian capacity will vary and has yet to reach any measure of equilibrium. We also recognise that there may well be some convergence of product offerings. While further examination is clearly necessary so that some appropriate metrics are developed, AIPA proposes that Qantas be constrained to invest in Qantas International to the extent that the combined subsidiaries and associated entities exercising Australian rights cannot, for example, offer more than twice the seat capacity or employ more than three times the number of flight crew. These examples are solely to illustrate the concept of an investment balancing mechanism.

AIPA proposes that such a mechanism could be inserted as a new subsection 7(1)(fa) that explicitly authorises the creation of subsidiaries and associated entities but which includes appropriate metrics to maintain an equitable investment regime.

Board Experience

AIPA supports the proposed amendment. We believe that it is critical that the Board is able to bring operational and engineering oversight to the running of the company and, importantly, both those fields of experience bring with them a longer term view than seems to characterise modern business practice.

Injunctive Relief

AIPA supports the proposed amendment. We believe that solely relying on Ministerial intervention is insufficient and that an alternative available to the members provides a more equitable system."

AIPA notes that some concern has been expressed about the Injunctive Relief provisions regarding the possibility of interfering with various other rights of individual shareholders to take action under the *Corporations Act 2001*. Our understanding is that such other rights as may exist cannot be extinguished or modified unless there is a specific enactment to that effect. There is no such proposal included in this Bill.

CONCLUSIONS

AIPA fully supports the intentions of Senators Xenophon and Brown to redress the serious issues that have come to light.

AIPA has concluded that the use of foreign-based foreign national cabin crew on domestic sectors may breach Australia's immigrations laws. We are awaiting further advice from DIAC in relation to this conclusion.

AIPA has concluded that the application of the *Fair Work Act 2009* to foreign-based foreign national cabin crew operating domestic sectors needs clarification

AIPA has concluded that the Bills could be amended to more effectively target solutions to the problems of operators exploiting foreign operating crew members working domestically and the lack of fatigue risk management for cabin crew, as well as Qantas management seeking ways to avoid their obligations in both the letter and the intent of the *QSA92*.

RECOMMENDATIONS

AIPA recommends the Senate Rural Affairs and Transport Legislation Committee explore fully the issues raised in our submissions and those of the other stakeholders and provide the impetus for Government to redress the current situation.

AIPA recommends the *Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011*, amended as we have suggested, be adopted as a means of preventing the exploitation of foreign workers and the broader issue of fatigue risk management.

AIPA recommends the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011*, with minor amendments as we have suggested, be adopted as a sound foundation upon which to begin the renovation of the *QSA 92*.

Attachment: **A.** Submission to the International Air Services Commission in Regard to the Qantas Application for Renewed and Revised Capacity Allocations, submitted 28 October 2011

-- END –

aipa
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SUBMISSION TO THE INTERNATIONAL AIR SERVICES COMMISSION IN REGARD TO THE QANTAS APPLICATION FOR RENEWED AND REVISED CAPACITY ALLOCATIONS

INTRODUCTION

On 11 October 2011, Qantas wrote to the Executive Director of the International Air Services Commission (IASC) seeking the renewal of 17 Determinations of capacity allocated to Qantas Airways Limited and its wholly-owned subsidiaries which will expire in 2012. Qantas has also requested variations to some of those extant Determinations, mainly to extend the usage of the allocated capacity to its wholly-owned subsidiaries and to allow combinations of internal code-sharing between Qantas and those subsidiaries.

The Australian & International Pilots Association (AIPA) is not in a position to comment on the quanta of the capacity allocated to Qantas and its wholly-owned subsidiaries. AIPA also observes that paragraph 2(ea) of section 15 of the *International Air Services Commission Act 1992* (*IASCA 92*), although discretionary, has been given the effect by the IASC of treating allocations of capacity, where wholly-owned subsidiaries exist, as consolidated allocations.

AIPA wishes to make submissions regarding the potential for adverse outcomes stemming from the way in which both paragraphs 2(e) and 2(ea) are applied, particularly in the context of the objects of the *IASCA 92*, the *Qantas Sale Act 1992* (*QSA 92*) and Schedule 2 of the *Competition and Consumer Act 2010* (the Australian Consumer Law).

WHO ARE WE?

The Australian & International Pilots Association (AIPA) is the largest Association of professional airline pilots in Australia. We represent nearly all Qantas pilots and a significant percentage of pilots flying for the Qantas subsidiaries (including Jetstar Airways Pty Ltd). We are a key member of the International Federation of Airline Pilot Associations (IFALPA) which represents over 100,000 pilots in 100 countries.

AIPA is committed to:

- sustaining, developing and expanding careers in professional aviation in Australia;
- consultative and cooperative engagement with like-minded management teams to further the benefits of aviation for all stakeholders;
- ensuring that safety and technical standards are upheld and that aviation businesses can flourish in a sensible and focused regulatory regime; and
- participating openly, honestly and forthrightly in all activities to achieve these aims.

SECURE OUR FLYING

As we said in the introduction to our submission to the forthcoming Senate Inquiry into the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011*:

> "It is critical ... that there is a widespread public and political recognition that AIPA is highly motivated to see Qantas succeed in a business sense so that we, directly, and more broadly the rest of Australia, benefit from that success. However, AIPA, in combination with what we believe to be the majority of the Australian public, is committed to see the success of this great Australian business take place with the minimum leakage of contributions to the Australian public purse, employment, skills development, national infrastructure and the national reach in time of emergency.
>
> AIPA is particularly aware that Qantas and its employees live in a dynamic and changing world of aviation as well as a changing world of business. We offer our considered advice ... against the backdrop of the national interests of prosperity, influence and security for all Australians."

THE QANTAS REQUESTS

Qantas has requested the renewal of 17 Determinations. Of those, AIPA is concerned about 6 requests which involve variations that relate to broadening the scope of the Determinations to included subsidiaries and/or corporate group code sharing. Those requests (emphasis added) are:

Qantas Request [2006] IASC 107 - Germany Route

Qantas is fully utilising the capacity under this determination. We therefore request renewal of this determination, as varied by Decision 214/2007, which allocates four frequencies per week on the Germany route and permits joint services with British Airways and Iberia Airlines, for five years from 1 July 2012.

As part of the renewal, Qantas seeks a variation to add conditions enabling capacity to be used by any wholly-owned subsidiary of Qantas and be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas.

Qantas Request [2006] IASC 108 - Hong Kong Route
Qantas Request [2006] IASC 114 - Hong Kong Route

Determinations 108/2006 and 114/2006 (each as varied by Decision 205/2007 to permit joint services with Air France) allocate fifteen and five frequencies per week on the Hong Kong route respectively. As Qantas is fully utilising the capacity under these determinations, we seek renewal of these determinations for five years from 1 July 2012.

As part of the renewal, Qantas seeks a variation to add a condition enabling capacity to be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas.

Qantas Request [2006] IASC 110 - Thailand Route

This determination allocates seven B747 weekly services in each direction on the Thailand route, all of which is currently being utilised. Accordingly, Qantas seeks renewal of this determination for five years from 1 July 2012. We would request to retain the conditions of the determination to support the code share arrangements with British Airways, Finnair, Air Malta, Iberia Airlines and Kenya Airways.

As part of the renewal, Qantas seeks a variation to add conditions enabling capacity to be used by any wholly-owned subsidiary of Qantas and be used by Qantas to provide services jointly with any wholly-owned subsidiary of Qantas.

Qantas Request [2006] IASC 117 - Japan Route

This determination allocates 45.6 8767-200 equivalent units of capacity per week in each direction on the Japan route. all of which is currently being utilised. Accordingly. Qantas seeks renewal of this determination. as varied to enable joint services with Japan Airlines, for five from 1 July 2012. As part of the renewal. Qantas seeks a variation to add conditions to enable joint services with Qantas or any wholly-owned subsidiary of Qantas.

Qantas Request [2006] IASC 123 - Philippines Route

This determination allocates 458 seats per week In each direction on the Philippines route. We seek renewal of this determination for five years from 1 July 2012. As part of the renewal, Qantas seeks a variation to add conditions enabling capacity to be used by any wholly-owned subsidiary of Qantas.

Another request involves a Determination that already includes those terms about which AIPA has concerns:

Qantas Request [2006] IASC 124 - Japan Route

Qantas seeks renewal of this determination allocating 0.6 8767-200 units of capacity per week in each direction on the Japan route, as varied, for five years from 22 April 2012.

Determination [2006] IASC 124 was made in anticipation of the commencement of Jetstar and contains the terms that AIPA understands Qantas seeks to import to the new Determinations requested. The following extracts provide the background and the conditions:

[2006] IASC 124 - Japan

"2.2 Under the Minister's Policy Statement (No. 5) of 19 May 2004, there is a rebuttable presumption in favour of the carrier seeking the renewal. The Commission notes that:

- Qantas has fully utilised the relevant capacity for most of the period since its allocation. The capacity is currently unused as a result of recent adjustments to Qantas' Japan operations, following the ending of services by Australian Airlines. However, there are firm plans for the capacity to be fully utilised again early in 2007 with the commencement of services to Japan by Jetstar;

...

3.3 The determination is subject to the following conditions:

- Qantas is required to fully utilise the capacity;
- only Qantas or another Australian carrier which is a wholly-owned subsidiary of Qantas is permitted to utilise the capacity;
- neither Qantas nor another Australian carrier which is a wholly owned subsidiary of Qantas is permitted to utilise the capacity to provide services jointly with another Australian carrier or any other person without the approval of the Commission;
- the capacity may be used by any wholly-owned subsidiary of Qantas to provide joint services with Qantas;
- to the extent that the capacity is used to provide joint services on the route, Qantas and any wholly-owned subsidiary of Qantas must take all reasonable steps to ensure that passengers are informed of the carrier actually operating the flight at the time of the booking;..."

For the benefit of any members of the public unfamiliar with the complexity of capacity management, Determination [2006] IASC 124 was amended by [2007] IASC 204, [2008]

IASC 216, [2008] IASC 221 and [2010] IASC 210. Decision [2007] IASC 204 enabled code-sharing by JAL. Decision [2008] IASC 216 amended the code-share city pairs and the date. Decision [2008] IASC 221 was a capacity reduction and Decision [2010] IASC 210 amended the code-share routes and extended the date to 31 December 2012.

AIPA'S CONCERNS

AIPA is concerned about how the IASC views the evolution of parent-subsidiary corporate capacity and code sharing arrangements today, given that there appear to be repetitive references to the analysis of the relationship between Qantas and Australian Airlines as justification for the probity of those arrangements in general. That issue first arose in the aftermath of the Ansett failure:

[2002] IASC 203 - Hong Kong, Japan, Singapore &Taiwan

"1.1 On 19 December 2001, Qantas applied to the Commission to vary determinations allocating capacity to Qantas on the Japan, Hong Kong, Singapore and Taiwan routes. On the Hong Kong, Japan and Singapore route Qantas is seeking to enable some or all of the capacity to be operated by a wholly owned subsidiary, at this time, Qantas envisages that some services would be operated by Australian Airlines Ltd, (AAL) (ACN 099 625 304)[1].

1.2 On the Taiwan route Qantas is seeking to have Qantas, Qantas Limited (ACN 003 613 465)[2] or AAL use the capacity and to permit Qantas and Qantas Limited to code share with Eva Air."

...

"3.5 The variation being sought is to allow a wholly owned subsidiary to use the capacity. Paragraph 7.3 of the Minister's Policy Statement states:

> "An Australian carrier seeking an allocation of capacity, or which may be permitted to use capacity allocated to an incumbent Australian carrier, will not be taken to be a new entrant if it is a subsidiary or a holding company of an incumbent Australian carrier operating on the route or if there is some other substantial connection between the two carriers in relation to ownership and control."

3.6 The Department of Transport and Regional Services (DOTARS) has advised that AAL is reasonably capable of obtaining the necessary approvals to operate on the Hong Kong, Japan, Singapore and Taiwan routes.

3.7 In the case of determinations allocating capacity on the Hong Kong, Japan and Singapore routes, Qantas is seeking a condition to allow the capacity to be used by a wholly owned subsidiary. Any existing code share arrangements are to remain between Qantas and foreign airlines only.

3.8 In relation to passenger capacity on the Taiwan route, capacity is allocated to Qantas Limited which is a subsidiary of Qantas Airways Limited, in this case Qantas is seeking to have Qantas Limited, Qantas Airways Limited or another Australian carrier which is a wholly owned subsidiary of Qantas use the capacity."

AIPA has expressed concern to the Senate Inquiry that treating the Qantas-Jetstar relationship as consistent with the Qantas -Australian Airlines relationship is flawed. We quoted an extract from Decision [2006] IASC 209 (which resulted in Determination [2006] IASC 103) for the start-up of Jetstar's Japan operations:

---

1 Still an active ACN as Australian Airlines Limited

2 Was Australia-Asia Airlines Limited, then became Qantas Limited and now is Express Freighters Australia Limited

> "4.5 The Commission has considered the issue of code sharing between Qantas and wholly-owned subsidiary companies on several occasions in relation to operations by Australian Airlines, another Qantas subsidiary, including on the Indonesia route - see Decision [2003] IASC 207. Similar decisions were made in respect of applications for code sharing on the Malaysia and New Zealand routes ([2003] IASC 205, and [2005] IASC 2006 respectively).
>
> 4.6 The Commission's position in those cases was that Qantas and Australian Airlines operated in different markets which best matched their product and cost structures and they would be unlikely to compete on price even where both carriers operated on the same route. The Commission concluded that there can generally be expected to be no lessening of public benefit from authorising the parent airline code sharing with the subsidiary airline. The Commission considers that the same conclusion is applicable in relation to code sharing between Qantas and Jetstar and will authorise code sharing between Qantas and its wholly-owned subsidiaries."

We than observed that Australian Airlines was just a 'minnow' compared to the Qantas 'whale' and the route structure was designed on a no-compete basis. Jetstar on the other hand is on a trajectory to outgrow its parent and, as the domestic market shows, is often directly competitive with Qantas.

AIPA is concerned that the parent-subsidiary corporate capacity and code sharing arrangements permitted by paragraphs 2(e) and 2(ea) of s15 of the *IASCA 92* have the unintended consequence of allowing Qantas to deliberately shrink its own operations in favour of its subsidiaries, in support of a strategy to circumvent the constraints of the *QSA 92*. While we recognise that capacity is broadly viewed as an Australian asset first and foremost, those arrangements act to protect capacity allocation while permitting so-called "phoenix" subsidiaries to emerge from the ashes of the parent airline. AIPA does not believe that such outcomes truly meet the object of the *IASCA 92*.

AIPA is further concerned the 'fair warning' condition is inadequate to properly give effect to the object of the Australian Consumer Law. That condition typically states:

- "to the extent that the capacity is used to provide joint services on the route, Qantas and any wholly-owned subsidiary of Qantas must take all reasonable steps to ensure that passengers are informed of <u>the carrier actually operating the flight</u> at the time of the booking;..." [emphasis added]

AIPA is concerned that identifying the carrier alone is insufficient to fully inform the passengers that the service standards, recruiting standards, training standards and operating procedures not the same for the marketing and operating carriers. We are concerned that the standard condition may not be sufficient to avoid a potential breach of ss 18, 29 and/or 34 of the Australian Consumer Law.

INTERNATIONAL AIR SERVICES COMMISSION ACT 1992

Section 3 sets out the object of the *IASCA 92* as follows:

> **"3 Object of Act**
>
> The object of this Act is to enhance the welfare of Australians by promoting economic efficiency through competition in the provision of international air services, resulting in:
>
> (a) increased responsiveness by airlines to the needs of consumers, including an increased range of choices and benefits; and
>
> (b) growth in Australian tourism and trade; and

(c) the maintenance of Australian carriers capable of competing effectively with airlines of foreign countries."

Section 15, in pertinent part, states:

"15 Content of determinations

(1) A determination may include such terms and conditions as the Commission thinks fit.

(2) Without limiting subsection (1), the determination:

(a) must specify the period, under subsection (3), during which the determination is to be in force; and

(b) may include a statement to the effect that the determination is an interim determination; and

(c) must include a condition that the capacity be fully used, except so far as:

(i) the determination provides otherwise in relation to a specified period commencing when the determination comes into force; or

(ii) the regulations otherwise permit; and

(d) must include a condition that, except to the extent permitted by the condition referred to in paragraphs (e) and (ea), the available capacity in question is only to be used by the one or more Australian carriers to whom the capacity is allocated; and

(e) must include a condition stating the extent (if any) to which any such carrier may use that capacity by providing joint international air services with another Australian carrier or any other person; and

(ea) may include a condition that, to the extent that any of the capacity is allocated to a particular Australian carrier, it may be used in whole or in part by any one or more of the following:

(i) the carrier;

(ii) a wholly-owned subsidiary of the carrier;

(iii) if the carrier is a wholly-owned subsidiary of another Australian carrier—that other carrier; and

(f) must include a condition stating the extent to which changes in the ownership or control of any such carrier are permitted while the determination is in force. "

AIPA submits that a cursory application of paragraphs 15(2)(e) and (ea) that ignores the emerging evidence of a Qantas strategy to 'phoenix' Jetstar will fail to satisfy subsections 3(a) and (c). For instance, the reduction in capacity or withdrawal of Qantas from some routes in favour of Jetstar reduces the range of choice and reduces the benefit to Australia, particularly where those passengers who prefer full service airlines seek out foreign carriers to gain that level of service. Transferring capacity to Jetstar, beyond the normal economic response to market conditions, also hastens the lack of competitiveness of Qantas in the full-service market.

AIPA suggests that the IASC should advise the Minister that the Ministerial Policy Statement may need to be reviewed in light of these unintended consequences. As desirable as corporate flexibility may be in some scenarios, it should never be permitted at the expense of the object of the Act.

AIPA further suggests that code share arrangements between associated entities may not be as beneficial as previous IASC Determinations and Decisions have indicated. This current round of renewals should be considered as sufficient reason to excite the latter requirement of subsection 3.6 of the Ministerial Policy Advice for full consultation with the Australian Competition and Consumer Commission.

QANTAS SALE ACT 1992

The forthcoming Senate Inquiry into the *Qantas Sale Amendment (Still Call Australia Home) Bill 2011* will explore the issues that concern AIPA the most in regard to the congruence of the intentions of the QSA 92 and those of Qantas management. One of the concerns that we have raised in our submission to that Inquiry is:

> "AIPA recognises that Qantas code-shares with many airlines, consistent with international airline practice. However, this practice is predominantly arranged with unrelated entities and would normally attract little comment. But should it be the same case when dealing with subsidiaries and associated entities?
>
> In the context of our discussion on the effectiveness of the *QSA 92*, it appears to us that international code-sharing arrangements between Qantas and its subsidiaries and associated entities provide a convenient platform for Qantas to shrink back from being an 'operating carrier' to becoming predominantly a 'marketing carrier'.
>
> While AIPA is unclear on what legal limitations may or may not exist, Qantas might even be able to relinquish its International AOC altogether, but still issue tickets in its own name for international flights on its subsidiaries, in much the same way as Qantaslink (which does not hold an AOC) does domestically. Improbable as that scenario may seem, it appears to us that the *QSA 92* could still be satisfied legally, even though the international business would mainly consist of just a call centre and associated IT facilities.
>
> AIPA believes that the burning question now, as it was in 2007 and in 1992, is whether strictly legal compliance with the *QSA 92* will satisfy the political and public expectation of protecting the survival of Qantas as Australia's pre-eminent national carrier? "

AIPA recognises that the IASC must make its determinations and decisions only in accordance with the IASCA 92, including the Ministerial Policy Statement. However, the IASC are the experts in the area of capacity allocations and code sharing arrangements and should therefore be able to identify where the potential strategies available to Qantas management begin to undermine the Australian framework for capacity allocation.

THE AUSTRALIAN CONSUMER LAW

AIPA is concerned that the negative impact on consumers as a result of code sharing between full-service and low cost carriers in general, and Qantas-Jetstar in particular, are not adequately identified to either outbound or inbound passengers. There is plenty of anecdotal evidence of Qantas passengers being most unhappy at discovering that the flight they booked as a Qantas flight is to be operated by Jetstar. Some passengers may enjoy some fleeting positive benefits in the reverse circumstances, but the situation is apparently disproportionately rare.

AIPA suggests that there are 3 provisions of the Australian Consumer law that may be relevant in terms of full disclosure:

> **"18 Misleading or deceptive conduct**
>
> (1) A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive."

"29 False or misleading representations about goods or services

(1) A person must not, in trade or commerce, in connection with the supply or possible supply of goods or services or in connection with the promotion by any means of the supply or use of goods or services:

...

(b) make a false or misleading representation that services are of a particular standard, quality, value or grade; or

..."

"34 Misleading conduct as to the nature etc. of services

A person must not, in trade or commerce, engage in conduct that is liable to mislead the public as to the nature, the characteristics, the suitability for their purpose or the quantity of any services."

AIPA believes that the standard condition was written when service standards were essentially similar or, at the very least, not as differentiated as full service and low cost carriers are today. We provided considerable evidence on that differentiation to the Senate Standing Committee on Rural Affairs and Transport *Inquiry into Pilot training and Airline Safety including Consideration of the Transport Safety Investigation Amendment (Incident Reports) Bill 2010* that was completed earlier this year.

Without offering any advice or suggestion of the preferability of one scheme over another, AIPA asserts that there are significant differences in the approach and standards used by operators in the recruitment and training of personnel, operating procedures and service standards, particularly between full service and low cost carriers. It is unreasonable to expect the average member of the public to understand those differences, either in absolute or relative terms, or to realise without being specifically alerted that the product and service standard that they paid for may not be available under a code share arrangement. Furthermore, having discovered the mismatched expectation, they may well be unable to exercise any further choice to redress the issue.

SUMMARY

AIPA is concerned that the true competitiveness of the parent-subsidiary corporate capacity and code sharing arrangements permitted by paragraphs 2(e) and 2(ea) of s15 of the *IASCA 92* has not been fully explored in current market conditions.

AIPA is concerned that the parent-subsidiary corporate capacity and code sharing arrangements are providing a vehicle for Qantas management to avoid the intent of the *QSA 92* and to shrink Qantas in favour of Jetstar for reasons other than market conditions.

AIPA is concerned that the level of disclosure required by the IASC about code-sharing between full-service and low cost carriers is inadequate and may lead operators to breach some or all of sections 18, 29 and 34 of the Australian Consumer Law.

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aipa

Advancing the interests of our members and the profession

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