

**Senate Standing Committee on Education Employment and Workplace
Relations**

**QUESTIONS ON NOTICE
Budget Estimates 2012-2013**

Outcome 4 – Workplace Relations and Economic Strategy

DEEWR Question No. EW0146_13

Senator Xenophon provided in writing.

Question

Employment of foreign nationals while working in Australia

During the inquiry into the Air Navigation and Civil Aviation Amendment (Aircraft Crew) Bill 2011, there was some discussion about the circumstances surrounding employment of foreign nationals while working in Australia. While that discussion centred on the application and enforcement of the *Fair Work Act 2009*, there is an as-yet unexplored corollary in regard to Occupational Health and Safety (OH&S). There are two areas of interest: a general one of application to foreign nationals and a more specific one of application in aircraft.

- What protections are available to a transient foreign nationals working in Australia who are not directly employed by an Australian entity?
- In regard to OH&S jurisdictional determinations for aircraft, is the key determinant of nationality the State of the aircraft Operator or the State of aircraft registration? If not, how is the OH&S jurisdictional determined?
- In international aviation law, local laws do not generally apply to activities occurring within a foreign-operated and foreign-registered aircraft until such time as the aircraft doors are opened at the end of a flight. Is this the case for the application of Australian OH&S laws?
- If an international flight in a foreign-operated and foreign-registered aircraft conducts a flight between two Australian ports, does it revert to being a foreign-controlled workplace whilst in flight (during “flight time” as defined in the Civil Aviation Regulations 1988)? If not, what is the applicable Australian OH&S law?
- The Full Federal Court recently found in *Heli-Aust v Cahill* [2011] FCAFC 62 that there is no right to prosecute for breaches of the state work safe legislation arising from civil aviation incidents in flight, as the state legislation is in direct conflict with the Commonwealth legislation for the regulation of the safety of civil aviation in flight in Australia. However, unlike other jurisdictions such as Canada with its Aviation Occupational Health and Safety Regulations (SOR/2011-87) or our own Occupational Health and Safety (Maritime Industry) Act 1993, there is no specific legislation for the OH&S protection of aircraft occupants other than the seat belt rules. Does the absence of specific OH&S provisions within the civil aviation legislation create a loophole for aircraft in flight?
- Is there a program to provide aviation-specific Commonwealth OH&S legislation, similar to other jurisdictions?

Answer

The Department of Education, Employment and Workplace Relations has policy responsibility for the Commonwealth’s *Work Health and Safety Act 2011* (the WHS Act). The WHS Act implements the model Work Health and Safety legislation developed by Safe Work Australia through the WHS harmonisation process. The object of the WHS Act is to secure the health and safety of workers and workplaces, including by placing duties on persons conducting a business or undertaking (PCBU).

The terminology employed by the model legislation was designed to capture the full range of modern working relationships and to remove WHS from the former paradigm of employers and employees.

Aviation safety in Australia is overseen by the Civil Aviation Safety Authority (CASA), which was established under the *Civil Aviation Act 1988* (the Civil Aviation Act). The primary objective of this Act is the promotion of safety in civil aviation, with a particular emphasis on preventing aviation accidents and incidents. Under the Civil Aviation Act, CASA is tasked with a range of safety related functions. Further requirements are contained in the *Civil Aviation Regulations 1988*, with Civil Aviation Advisory Publications providing non-binding guidance on CASA's preferred compliance methods.

What protections are available to a transient foreign nationals working in Australia who are not directly employed by an Australian entity?

The Commonwealth has a limited WHS jurisdiction, covering only the Commonwealth itself, public authorities and non-Commonwealth licensees (on a transitional basis). There are no commercial aviation operators within the Commonwealth's WHS jurisdiction. To the extent the question is directed at foreign aircrew, this question might best be directed to CASA.

In regard to OH&S jurisdictional determinations for aircraft, is the key determinant of nationality the State of the aircraft Operator or the State of aircraft registration? If not, how is the OH&S jurisdictional determined?

To the extent it is directed at foreign aircrew, this question might best be directed to CASA.

In international aviation law, local laws do not generally apply to activities occurring within a foreign-operated and foreign-registered aircraft until such time as the aircraft doors are opened at the end of a flight. Is this the case for the application of Australian OH&S laws?

State and territory WHS laws apply geographically. The Department is not in a position to comment on how state and territory laws apply to foreign aircraft. To the extent the question is directed at foreign aircrew, it might best be directed to CASA.

If an international flight in a foreign-operated and foreign-registered aircraft conducts a flight between two Australian ports, does it revert to being a foreign-controlled workplace whilst in flight (during "flight time" as defined in the Civil Aviation Regulations 1988)? If not, what is the applicable Australian OH&S law?

As noted above, the Commonwealth's WHS jurisdiction does not encompass domestic or foreign commercial carriers. Again, this question might best be directed to CASA.

*The Full Federal Court recently found in *Heli-Aust v Cahill* [2011] FCAFC 62 that there is no right to prosecute for breaches of the state work safe legislation arising from civil aviation incidents in flight, as the state legislation is in direct conflict with the Commonwealth legislation for the regulation of the safety of civil aviation in flight in Australia. However, unlike other jurisdictions such as Canada with its Aviation Occupational Health and Safety Regulations (SOR/2011-87) or our own Occupational Health and Safety (Maritime Industry) Act 1993, there is no specific legislation for the OH&S protection of aircraft occupants other than the seat belt*

rules. Does the absence of specific OH&S provisions within the civil aviation legislation create a loophole for aircraft in flight?

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