9 April 2009

Assistant Commissioner
Productivity Commission
GPO Box 1428
Canberra City ACT 2601

Dear *[Sir]*

Re: Review of regulatory burdens on business – social and economic infrastructure services

Qantas welcomes the opportunity to provide comments to the Productivity Commission's review of regulatory burdens on business.

Aviation is necessarily a heavily regulated industry. In Qantas' view, however, aspects of the regulatory framework in the Australian aviation system could be refined. It is possible to more effectively balance security, facilitation and affordability outcomes, while maintaining high safety and service standards and enhancing productivity.

The examples in the attached submission are not exhaustive, but seek to highlight a range of representative regulatory burdens and their associated impacts on business costs and productivity. We have previously canvassed some of these issues in other contexts, including our submissions to the Government's development of a National Aviation Policy Statement.

In addition to the aviation specific areas identified in our submission, Qantas is also subject to unnecessarily complex and burdensome regulation in generic areas such as tax and occupational health and safety. We anticipate putting forward views to that aspect of the Commission's cyclical review at the appropriate time.

We would be pleased to provide any further information if it would be of assistance.*[Contact details provided].*

Yours sincerely

David Epstein
Group Executive
Government and Corporate Affairs

PRODUCTIVITY COMMISSION REVIEW OF REGULATORY BURDENS ON BUSINESS:
SOCIAL AND ECONOMIC INFRASTRUCTURE SERVICES

SUBMISSION BY QANTAS AIRWAYS LIMITED

APRIL 2009

AVIATION INDUSTRY

Regulation

Aviation is one of the most heavily regulated industries in the world.

This is a legacy of government involvement in the industry (the majority of airlines operating today still have some level of government ownership or support) as well as a reflection of the sector's activities.

In aviation, both technical aspects, including safety and security, and economic opportunities for industry participants are regulated. Economic opportunities, such as access to markets and capital, are regulated through the bilateral framework of government-to-government air services treaties.

Both streams of regulations involve significant levels of compliance activity.

In respect of the bilateral framework, in Qantas' experience, enforcement of regulation that could be described as "burdensome" or "unnecessarily complex" – for example filing of tariffs – is limited to overseas jurisdictions, which do not fall within the scope of the Commission's review.

Against this background, the Group's comments focus on technical or operational regulation of aviation.

The International Civil Aviation Organization (ICAO), an agency of the United Nations, develops standards and recommended practices concerning air navigation, prevention of unlawful interference and facilitation of border-crossing procedures for international civil aviation, however, it does not in itself have a regulatory role.

Operating environment

The bilateral framework advantages airlines based in large and/or central geographic locations, and prevents cross-border consolidation due to its nationality based designation criteria. In combination with high levels of government ownership and support, this has produced a highly distorted and competitive industry.

Aviation is highly capital-intensive, with long lead times for investment similar to those in the mining industry. Qantas currently has close to $20 billion of aircraft orders over the next 10 years.

The aviation industry is highly volatile, with financial performance following that of economic activity, but in more pronounced cycles. Airlines' lack of ability to consolidate has led to long-term over-capacity in the industry, which is manifested in the poor average industry return of 0.3 percent[1] over the past 60 years. Thin margins are characteristic of the industry, with a 0.3 percent average achieved over the same period[2]. Even at the peak of the industry cycle, margins were less than three percent. By comparison, the margins of other players in the "aviation chain" are significantly higher.

1 Speech by IATA Director General Giovanni Bisignani, New York, 19 February 2009
2 Speech by IATA Director General Giovanni Bisignani, Geneva, 24 March 2009

A decline in yields at a greater rate than costs over time is a feature of the industry which has been accelerated in recent years through a number of major external shocks. Airlines have sought to arrest this trend in a number of ways, including through the development of new business models, investment in more efficient fleets, diversification of activities, labour productivity initiatives, outsourcing, entering new markets and developing partnerships with other businesses. Qantas has been active in each of these areas, a number of which have been part of our Sustainable Future Program, which has removed $3 billion from our cost base over the past five years and is targeting a further $1.1 billion by mid 2010.

Against this background, and the significant level of compliance activity involved in the industry, efficient regulation can make a significant contribution to its competitiveness.

REGULATORY FRAMEWORK

The Australian Government's enhanced regulation-making requirements came into effect on 20 November 2006.

These requirements include *inter alia* the need for preliminary assessments for all regulatory proposals to determine the level of regulatory impact analysis they require, an assessment of compliance costs and greater use of cost-benefit analysis, and a whole-of-government consultation policy. In addition, each six months Australian Government departments and agencies must provide compliance information to the Office of Best Practice Regulation (OBPR) on the best practice regulation requirements, which the OBPR reports publicly.

One of the key findings of the 2006 report of the Taskforce on Reducing Regulatory Burdens on Business was the need for much better consultation with stakeholders throughout the regulatory development processes.

To this end, the OBPR has developed a range of material to assist policy officers in this task, as well as engaging with stakeholders directly, believing that "Better outcomes — high quality regulation — should result from greater business involvement in the regulation-making process."[3]

Qantas regards these developments as positive, and we would hope that over time, more regular and comprehensive consultation will see a reduction in regulation that is unnecessarily burdensome or complex and which impedes efficient business activity.

SECURITY

Regulatory environment

The current Australian aviation security regulatory environment was instituted in 2004 with the enactment of the *Aviation Transport Security Act 2004* (ATSA) and associated *Aviation Transport Security Regulations 2005* (ATSR). This legislation was established in part to repeal the security sections of the *Air Navigation Act 1920* and *Air Navigation Regulations 1947*, and in part as a response to the events of 11 September 2001.

[3] Office of Best Practice Regulations Report 2007-08 p viii

Since the introduction of the ATSA and ATSR, there have been six amendments to the Act and 18 amendments to the Regulations. In addition, a number of subordinate ‘Notices’ and ‘Directions to Vary’ have been issued to industry participants.

The Office of Transport Security (OTS) has filed two differences with ICAO pertaining to aviation security training (Annex 17 - 3.1.6) and the treatment of transfer baggage (Annex 17 - 4.5.4).

Since 11 September 2001, the regulatory burden on the industry has increased and continues to do so, with few redundant regulations being removed or replaced.

Immediately prior to the enactment of the ATSA and ATSR there were approximately 80 security-based regulations affecting airlines contained within the *Air Navigation Regulations 1947*, 12 in the *Air Navigation (Checked Baggage) Regulations 2000* and some 30 others contained in *Additional Security Measures*.

Today there are approximately 275 security-based regulations affecting airlines contained within the ATSR, a 125 percent increase not including current Notices.

Outcomes

Qantas has consistently requested that the OTS and its predecessors articulate the security outcome (against the risk) for each regulation contained with the ATSA and ATSR. We believe that if this increased transparency was achieved, alternative sustainable means of compliance may be realised, as well as a recognition that some regulations are redundant or poorly expressed, for example if there is no security outcome, or the outcome does not match the risk.

Qantas contends that there are a number of regulations that have no security outcome or with which compliance is impractical, but nonetheless place an obligation on us.

We accept that certain information requested by regulation may be valuable to the OTS, but believe that this can be obtained outside the regulatory environment, eg during an audit or by direct request. Some examples are as follows:

ATSR 2.29 (1) requires Qantas to articulate within its Transport Security Program (TSP) the “roles and responsibilities of other Commonwealth State and Territory agencies and local authorities, with security duties at the airport”.

This information is already known to the OTS, as airport operators are required to provide it with identical information. In addition, Qantas is unable to influence any change in responsibility. Against this background, Qantas believes this regulation has no security outcome, and that our resources are being unnecessarily diverted in drafting and updating the information required.

Other regulations we regard in a similar category are 2.29 (1)(a), 2.31(1)(c), and 2.45 (1).

Under ATSR 2.32, Qantas is required to “deter and detect unauthorised access into the airside area by people, aircraft, vehicles and things”.

- People are not “authorised” into an airside area; by holding and displaying a valid Aviation Security Identification Card (ASIC) access is inferred, but not authorised. OTS has confirmed that there is no single agency that “authorises” people into an airside area. While individual operators – including Qantas – may have systems and processes in place concerning airside access, if people are not “authorised”, it follows that they cannot technically be “unauthorised”. This inconsistency needs to be rectified.

- Similarly, aircraft are not “authorised” into an airside area; aircraft receive an Air Traffic Control (ATC) clearance to taxi, take-off and land, but are not authorised. Provided that landing fees are paid and all other airworthiness requirements are met, including complying with ATC, any aircraft can land and depart a public airport. This is in contrast to vehicles, for which compliance can be achieved.

- In addition, “things” is not clearly defined in the regulations and it can therefore be difficult to comply with this requirement.

Nonetheless, OTS could refuse to accept Qantas’ TSP without some form of compliance with the first two examples, direct Qantas to rewrite the TSP, or find Qantas to be in non-compliance with the Act requirement (s14) to comply with our TSP. The penalty for this would be $110,000 per offence.

ATSR 4.19 requires that Qantas “ensure that checked baggage is not accessible to an unauthorised person between the time it is checked in and the time it is made available… for collection…”.

In all international terminals and at some domestic terminals (eg Adelaide and Cairns), once checked baggage is received by Qantas it is placed on the airport operator’s baggage system, sorted and screened (the reverse is true for arrivals). Airlines in general do not have access to these baggage systems. For this reason, Qantas cannot always “ensure” unauthorised access during these periods.

The penalty for non compliance is $27,500 per offence.

Requirements for information

There are a number of instances when Qantas is required to provide (and maintain) information to the OTS which is readily available within the public domain. Examples include:

- detailing the roles and responsibilities of Commonwealth Agencies - 2.29(1)(d);
- detailing the roles and responsibilities of Commonwealth Agencies - 2.52(1)(d);
- details of the operators aircraft, type and number – 2.31(1)(c)(i);
- details of regular routes flown and airports served – 2.31 (1)(c)(ii);

There are also a number of cases where Qantas is required to provide, in documentation, information back to the OTS which is already known to them, as the source of the information. Examples include:

- detailing the roles and responsibilities of Commonwealth Agencies - 2.29(1)(d);
- procedures to carry out screening and clearing. OTS directs Qantas, by Notice, how to carry out screening – 2.35(1)(a);
- procedures to carry out screening and clearing. OTS directs Qantas, by Notice, how to carry out screening – 2.35(1)(c);
- procedures to carry out screening and clearing. OTS directs Qantas, by Notice, how to carry out screening – 2.35(1)(d);
- procedures to carry out screening and clearing. OTS directs Qantas, by Notice, how to carry out screening – 2.37(1)(a); and
- procedures to carry out examination of cargo. OTS directs Qantas, by Notice, how to carry out screening – 2.41(1);
- procedures to carry out examination of cargo. OTS directs Qantas, by Notice, how to carry out screening – 2.48(1)(a); and
- procedures to carry out examination of cargo. OTS directs Qantas, by Notice, how to carry out screening – 2.51(1)(h).

There are a number of occasions when Qantas is required to provide information to the OTS for no perceived security outcome. OTS has previously advised that this information is gathered but not assessed as adequate, acceptable or sufficient, as no OTS standard exists against which it can be measured. Examples include:

- process for selecting auditors – 2.30(1)(b);
- process for selecting auditors – 2.53(1)(b);
- the criteria for selecting the security contact officer – 2.45(1)(a);
- the criteria for selecting the security contact officer – 2.58(1)(a);
- the training that must be given to a person selected – 2.45(1)(b); and
- the training that must be given to a person selected – 2.58(1)(b).

In all the cases cited above, the requirement to draft and update the information required means that Qantas resources are diverted from other activities at a cost to the business.

ATSR Division 2.3 sets out the data that is required to be submitted to the OTS as part of the TSP. In some cases, penalties are attached for failing to update the data within two or seven days. This requires Qantas to place priority on monitoring and updating information to OTS that is either already known to them, in the public domain or without security outcome. The penalty for non compliance is $11,000 per offence. In our view, these regulations should be removed from the statute and the information provided to OTS outside the regulatory environment as a once only information pack.

Development of legislation and consultation

Anecdotal evidence suggests that the OTS has had difficulty in planning and securing adequate resources from the Office of Legislative Drafting (OLD).

As a result, it appears that, on occasions, the OTS is placing before OLD the most straightforward legislative drafting or amendment, rather than the most pressing. The most extreme example of this has been the need since 10 March 2005 to amend[4] the flight deck access requirements to permit certain classes of persons to access and remain on a flight deck, i.e. manufacturer's engineers, air traffic controllers, medical personnel in an emergency.

This apparent difficulty in securing OLD resources increases can also result in rushed (or no) consultation, which significantly increases the potential for unintended consequences and therefore the regulatory burden on Qantas.

A potential solution would be the consideration of a NPRM process similar to that used by many regulators, including the Civil Aviation Safety Authority, the United States Transportation Security Administration (TSA) and the New Zealand Civil Aviation Authority (NZCAA)[5].

A NPRM typically consists of the draft rule plus the supporting information in a preamble that is required to satisfy the requirements of the Act.

The following is typical of the information covered in a NPRM[6]:

- Summary
- Invitation to comment
- Availability of rule making documents
- Glossary
- Outline of proposed rule making
- The proposed amendments
- Annual burden estimate
- Regulatory impact analysis
- Benefit of rule (including economic benefits)
- Regulatory flexibility
- Reasons for proposed rules
- Objective of the proposed rule
- Affected small business population and estimated impact of compliance
- Significant alternatives considered
- International trade impact
- Unfunded mandates assessment
- Environmental analysis
- Energy impact analysis

The NPRM is then released for public consultation via publication on the regulator's website, with notification sent to those persons or entities that are likely to have a direct interest in the NPRM, or who have requested notification.

Specialist staff within the regulator will often provide industry briefings to enable informed comment and submissions to be made during the consultation process. An NPRM will typically be open for public submissions for a period of 30 to 60 days.

After the public consultation closes, the regulator publishes on its website a summary of public submissions which it has prepared to aid development of the final rule.

[4] These regulations were finally amended on 25 February 2009
[5] Details of the NZCAA's rule making process can be found at http://www.caa.govt.nz/rules/rules_and_more.htm
[6] Taken from the TSA Docket No 2007-28572 – Secure Flight Program NPRM

Following further consideration and consultation, the proposed rule is then developed as the final rule, and then published, usually with a required implementation date.

Qantas has found this approach useful in other jurisdictions as it provides adequate opportunity to discuss with the regulator the implications (intended or unintended) of proposed rules and provides a reliable process to rule making. It is during this process that the regulatory burden can be discussed and potentially reduced by building in a head of power for the regulator to accept and consider an alternative approach to the one proposed.

One size fits all regulation

Aviation security has traditionally operated within a prescriptive regulatory environment. In recent years, many regulators, including the OTS, have moved toward outcome-focused, risk-based regulations.

Industry generally prefers outcome-based regulations as they permit the desired security outcome to be achieved by several methods. Accordingly, a diverse industry is able to customise its operations to most efficiently meet the outcome without being constrained by a prescriptive requirement.

An example of such a prescriptive requirement is the obligation for passengers arriving on inbound international aircraft with an additional domestic sector to disembark with all assessable property and be re-screened (ATSR 4.13). This regulation is designed to protect against unknown or sub-standard screening overseas, however, it includes all inbound aircraft, regardless of whether the standard of screening at the last airport prior to arrival meets or exceeds that required by the Australian Government.

Qantas believes that the regulatory environment could be fine-tuned to permit specific services meeting the required standard to operate under an alternative method, variation or exemption.

This method of regulation management is common throughout the world. For example, within the United States, Qantas is approved to operate to, from and within the US once the TSA is satisfied that Qantas complies with the US regulatory regime. However, once operations commence, Qantas can (and has) made representations to the TSA to seek an alternative method of compliance to that stipulated within regulation. The TSA assesses the outcome of the alternative proposed and, provided that it meets or exceeds the regulated requirement, an alternative procedure is granted.

Qantas has sought and received a number of such requirements such as the transit baggage screening rule. Until early 2008, Qantas operated seasonal flights from Sydney to Vancouver via San Francisco. The US requires all checked-in baggage removed from the aircraft in San Francisco to be re-screened in San Francisco. Qantas proposed security measures associated with the removal of Vancouver-bound baggage from the rear of the aircraft to the front for weight and balance and the safe operation of the onward flight, which satisfied the TSA. As a result, the baggage was not re-screened in San Francisco and Qantas saved in excess of A$100, 000 per annum in reduced ground time at San Francisco and unnecessary baggage handling costs.

A similar exemption or request for variation system already exists within the Australian aviation environment within CASA regulatory environment.

General requirements on exemptions are covered under the Civil Aviation Safety Regulations (CASR) 11F. Under the CASA methodology, each class of regulation needs to include authority to issue an exemption. For example with respect to aerodromes (all aerodrome regulations fall under CASR 139). The CASR authority is stated in CASR 139.020 as follows:

(1) CASA may, by instrument, exempt an aerodrome operator from compliance with specified provisions of this Part or specified standards set out in the Manual of Standards.

(2) Before exempting an aerodrome operator, CASA must take into account any relevant considerations relating to the interests of the safety of air navigation.

(3) An exemption is subject to the operator complying with any conditions that CASA specifies in the instrument as being necessary in the interests of the safety of air navigation.

(4) The operator must comply with a condition specified in the instrument.

Penalty: 10 penalty units.

The CASA regulations are supported by a Manual of Operating Standards (MOS) which is mandatory. In this case MOS 139 - Aerodromes. The regulations are further supported by a Civil Aviation Order (CAO) which is mandatory. The exemption authority is repeated as follows:

2.1.3 Exemptions to Standards

2.1.3.1 An exemption granted to an existing facility continues to apply until its expiry date.

2.1.3.2 Application for new exemptions must be supported, in writing, by cogent reasons including, where appropriate, an indication of when compliance with the current standards can be expected.

2.1.3.3 Those standards which include phrases such as “if practicable”, “where physically practicable”, etc., still require an exemption to standards when aerodrome operators wish to take advantage of the non-practicability of full compliance.

2.1.3.4 Exemptions to standards, granted to an aerodrome, must be recorded in the Aerodrome Manual. The Manual must contain details of the exemption, reason for the granting, any resultant limitations imposed, and similar relevant information.

CASA publishes all issued exemptions on its website as public information.

Qantas recommends that the OTS introduces an amendment to the ATSA and ATSR to permit the Secretary to grant exemptions, variations and alternative procedures. We believe that this will provide opportunities to reduce the regulatory burden, while still meeting the desired outcomes of the regulator.

Harmonisation, mutual recognition and Last Port of Call

There is a number of harmonisation, mutual recognition and Last Port of Call (LPOC) issues that create unnecessary regulatory burdens for business. A number of typical examples in each category are provided below.

Harmonisation of sustainable international security requirements is a major focus of ICAO. Two recent examples where deviation has caused additional regulatory burden are with the Australian LPOC Liquids, Aerosol and Gels (LAGS) requirements and the Prohibited Items list.

Liquids Aerosols and Gels (LAGS)

After the LAGS incident at London Heathrow in August 2006, most regulators enacted enhanced requirements for aircraft departures within their jurisdiction. Australia enhanced its regulatory requirements, but also enacted regulations for inbound flights.

The new Australian requirements have resulted in passengers being treated differently even if travelling on the same route. For example:

Passenger A	Travels Madrid to London on British Airways, London to Sydney via Hong Kong on Qantas. The passenger disembarks and transfers to the Sydney domestic terminal to travel on a Qantas Sydney to Melbourne service. This passenger can keep their oversized duty free LAGS purchased in Madrid.
Passenger B	Travels Madrid to London on British Airways, London to Sydney via Hong Kong on Qantas. The passenger transfers to a Qantas international service to Melbourne from the Sydney international terminal. This passenger has his or her LAGS confiscated in Sydney having completed a 23-hour journey in compliance with European, Spanish, British and Hong Kong regulators.
Passenger C	Travels Madrid to London on British Airways, London to Melbourne on Qantas and does not leave the aircraft when in transit in Asia. This passenger can keep their oversized duty free LAGS.

This has required Qantas to develop notifications on tickets, check-in counters and websites, and manage the ongoing customer confusion that arises from the complexity of the requirements.

OTS penalties apply to LAGS offences with $11,000 for individual passengers and $110,000 for airlines.

Qantas believes that bilateral or multilaterally agreed requirements would have been preferable to unilateral action that has placed considerable additional regulatory burdens on airlines.

Prohibited Items

ICAO has published a list of items prohibited in the cabin of an aircraft which has been reproduced by many regulators worldwide. The Australian Government amended the list, placing it in conflict with overseas requirements. For example:

Passenger A	The US Government (TSA) screens passengers in Los Angeles. While the TSA permits knitting needles in aircraft cabins of the aircraft (Qantas aircraft), the Australian Government does not. Once a passenger boards a Qantas

	aircraft in Los Angeles an offence of strict liability carrying a penalty[7] of two years imprisonment has been committed.
Passenger B	Travels Sydney to Singapore on Qantas and has their pocket pen knife (Swiss army knife) confiscated in Sydney. The passenger continues to Zurich on a connecting flight operated by Swiss. The passenger is offered and sold a new Swiss army knife duty free onboard. The passenger travels Zurich to London without incident. The passenger then travels London to Sydney via Singapore on Qantas. The new Swiss army knife is confiscated in Singapore.

These examples highlight the additional regulatory complexity imposed for no discernible security outcome.

Prohibited items and weapons offences carry two and seven year imprisonment terms respectively.

<u>Mutual Recognition</u>

While some success has been achieved by the OTS and other areas continue to be explored, there are a number of regulations where mutual recognition may result in equivalent security outcomes and a reduced regulatory burden. These areas include:

- Transport Security Programs;
- checked baggage screening;
- passenger and in-cabin screening;
- liquids, aerosols and gels (LAGS);
- cargo screening

Prior to the enactment of the ATSA and ATSR, Australia generally followed the ICAO model for the contents of an airline's aviation security program. This ICAO template had been developed over many years to provide consistency internationally, thereby allowing airlines to develop one document that would be universally accepted worldwide.

With the introduction of the ATSA and ATSR, Qantas is required[8] to develop a TSP. As the requirements and format of the TSP are not aligned with international practice, Qantas is unable to use this document to satisfy the needs of overseas regulators. This has resulted in Qantas now being required to submit an equivalent ICAO type document in each jurisdiction it operates. With respect to security documentation, passenger, baggage and cargo screening, we believe that considerable benefit can be derived by the OTS seeking mutual recognition from overseas regulators. Qantas accepts that this is likely to take some time, either through bilateral or multilateral agreements, but that this is worth pursuing.

Pending the negotiation of such agreements, amendment to the ATSR and ATSA could assist in reducing the regulatory burden. Qantas suggests that a number of regulations could be amended employing an approach with language similar to ATSR 4.27(2), which states in part:

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[7] Sections 56 and 57 of the ATSA
[8] Section 12 (1)(b)

“An item of baggage must be screened….. if:
(a) the aircraft’s operator **cannot demonstrate** that the item:
(i) was screened at any of the aircraft’s previous ports of call ….; and
(ii) has been kept continuously secure since it was screened;

For example, this would remove the absolute requirement of ATSR 4.69 (3) that requires Qantas to “check the cargo holds…before any cargo is loaded”. In many instances the cargo hold was searched previously at another location and kept closed until additional loading takes place.

FACILITATION

Advanced Passenger Processing

In January 2003, the Australian Government introduced mandatory Advance Passenger Processing (APP). Under these arrangements, airlines are required to provide the Department of Immigration and Citizenship (DIAC) with biographic information on all passengers and crew, including all transit passengers, travelling to Australia.

This information is collected at check-in by airlines from the passenger’s passport and transmitted to DIAC, where it is cross-checked against Australia’s immigration databases. Airlines in turn receive a confirmation that the passenger or crew member has an authority to travel to Australia.

The Government has recently passed legislation allowing DIAC to impose fines on airlines who fail to provide this APP data, effective 1 July 2009. A compliance threshold of 99.8% has been administratively chosen as the commencement point, based on the current airline industry reporting average. The fines regime is designed to encourage airlines to meet the legislative requirements of full compliance.

Airlines who do not meet the APP reporting obligations will commit an offence under Section 245N of the *Migration Act 1958*. An offence is committed for each individual passenger or crew member who is not reported via APP. Offences carry a penalty of 10 points or $A1,100 for each offence.

Airlines that achieve a reporting rate of 99.8% or higher in a month will not be fined for offences committed the subsequent month. However if an airline’s reporting rate falls below the threshold rate, the airline will face fines for each and every offence in the subsequent month. This is in addition to the current infringement regime that fines airlines A$5,000 for carrying an inadequately documented passenger to Australia.

The cost to Qantas to administer APP at the current threshold is significant, and will increase proportionately to any further increase. Based on current data, we would expect the cost to the Group of infringements alone to be approximately $4 million per annum under the new regime.

As a result of the introduction of the APP compliance threshold, our operations will need to be modified and this will adversely impact on efficiencies gained through implementation of a variety of passenger and operational initiatives, which have been supported by considerable investment in systems.

Airlines such as Qantas have the ability to check a passenger in at their point of origin and issue multiple boarding passes covering various sectors on carriage with more then one airline. For example, a passenger can commence his or her journey from one of many airports located in mainland USA and connect over major gateways such as Los Angeles for onward carriage with Qantas. In such cases, we are reliant on the uplifting carrier to provide us with the APP data.

It is unrealistic and impractical for each airport of origin to have in place the necessary infrastructure and resources to enable the collection and transmission of a passenger's passport details. To avoid the prospect of receiving a fine, airlines operating to Australia will have to intercept such passengers to collect and transmit their APP data. This practice is labour-intensive, costly and can compromise the scheduled departure time of the aircraft.

Aside from the fulfilment of 100 percent compliance in accordance with the legislation, Qantas can see no material mitigation of risk, and consequently no benefit, is achieved by the enhanced regulation – rather increased costs and inconvenience to passengers appear to be the likely outcome.

Against this background Qantas would like the APP regime reviewed with consideration given to revising the methodology to take into account the principles of risk management.

SAFETY

Safety Regulation

While CASA has a stated policy of seeking not to impose unnecessary costs on business, this is not always the case in practice. For example, the requirement (under recent amendments to CAO 82.3 and CAO 82.5) for airlines to carry "certified hard copy of AOC onboard all international flights" is a particularly burdensome, costly and ongoing resource demand on the airline. Qantas Airlines has its eight-page AOC reissued approximately 10 to 12 times annually and operates a fleet of some 150 aircraft, with all types able to operate international services. This represents some 14,400 pages of certified authentic documentation each year that Qantas would be required to load on to and keep current on aircraft across its global network, involving a significant cost burden to us.

Pursuant to the above Directive, CASA is required to ensure that "each proposed regulation must be assessed against the contribution it will make to aviation safety." However, Qantas can see no safety benefit from carriage of the current AOC. If the requirement could be justified on safety grounds, a simple and cost effective solution could be to carry a copy of the generic AOC (which would indicate certain operational details) with reference to the link to the CASA website where the latest copy is available for viewing.

Effective administration of the Notice of Proposed Rule Making (NPRM) and the consultation process leading to the development and implementation of regulations would avoid these sorts of outcomes. In this regard, the CASA / industry Standards Consultative Committee (SCC) has a key role to play.

CASA is continuing with its regulatory reform programme (RRP) which has an outcomes-based focus, with a commitment to completion by the end of 2010.

The development and mandating of the Safety Management Systems (SMS) approach is supported by Qantas. The advantages to the aviation industry, and in particular to a large and complex organisation such as Qantas, of such a regulatory regime are numerous. The mandating of SMSs for airlines, which is consistent with ICAO requirements, recognises the fact that Air Operators Certificate (AOC) holders must be responsible for effectively managing their own risks. Due to the complexities and variance of modern airline operations, the nature, range and interrelationship between risks and operations necessarily varies enormously, and the management of those associated risks, such as safety, similarly vary significantly.

Qantas Airways Limited encompasses five wholly-owned Australian subsidiary airlines (or AOCs). Express Freighters Australia has four Boeing 737 aircraft and 25 pilots and operates a relatively simple freight operation. In comparison, Qantas Airlines has over 25,000 employees, offers services across a network covering 151 destinations in 38 countries and operates a fleet of some 150 aircraft, comprising Boeing 747s, 767s, 737s and Airbus A380s and A330s.

It is important that in introducing the new regulatory requirements it is recognised that the varying complexity of developing or modifying tailor-made systems will require different allocation of resources and timing.

By way of example, on 27 February 2009 CASA granted an exemption to Qantas for the implementation on the new *Civil Aviation Safety Regulation (CASR)* Part 99 *Drug and Alcohol Management Plan (and testing) (DAMP).* This exemption granted an additional 12 months extension beyond the regulatory requirement of six months to conduct the DAMP training of more than 21,000 employees and contractors in safety sensitive roles. The time and cost of resources required to prepare this application for exemption, and the uncertainty over whether it would be granted, could have been avoided had greater consideration been given by the regulator to the varying magnitude of the task across different organisations.

Moreover, the effort and resources consumed by the regulator in assessing such a request necessarily diverts its resources and attention from its primary safety oversight obligations. In Qantas' view, the limited "safety dollar" ought to be expended in the most effective manner - for both the regulator and regulated.

The pending introduction of mandatory (CASA approved) Fatigue Risk Management Systems (FRMS) by way of amendments to CAO 48 is another complex area for development and implementation which is about to be subject to uniform time.

In both the above cases, this issue could have been avoided by due consideration in development of the relevant Regulatory Impact Statements. In Qantas' experience, CASA has underestimated cost impacts for larger organisations in addition to regulatory complexity. For example, the recent amendment to CAO 82.5 requiring operators to implement a SMS and provide two days of human factors training was published, indicating that it would cost business around $175,000. However, these figures fall short of the realities of cost and resource allocation for a larger organisation. As a general rule of thumb, in the training arena alone the allocation of one full day of training for all instructors is approximately $500,000 and the loss of 300 days of productivity. These costs do not include an electronic system that is capable of storing up to 20,000 training events each year, which would be cost in the order of millions of dollars, nor the development costs and resource scheduling involved. For an organisation such as Qantas therefore, CASA's estimate for implementation roughly less then 10 percent of the real costs to business.

Another example of a regulatory burden on Qantas is that of individual approvals issued to flight crew instructors under a CAR 217 organisation. The CAR 217 organisation (training and checking department) is subject to a highly prescriptive approval system by CASA – at a cost to Qantas – which includes the qualifications and responsibilities of relevant individuals, as well as ongoing surveillance of the airline and its activities overall. In addition to this, CASA requires approval for individuals at a further cost to Qantas in excess of $30,000 per annum. This adds no safety benefit and is purely an administrative burden that can be justified by outdated legislation. The enforcement of this requirement, which borders on "double dipping" from a cost perspective, also varies based on the interpretation of the legislation at individual CASA field offices.

Air Traffic Management

In 2007 airspace regulation and administration was transferred from Airservices Australia to a newly established Office of Airspace Regulation (OAR) within CASA. The move was designed to streamline existing processes, which involved regulation by three bodies (CASA, Airservices, and the then Department of Transport and Regional Services). Qantas supported this transfer on the basis that it would ensure consistency of regulation and appropriately separate policy making, commercial service provision and regulatory functions.

However, the process of implementing changes to the airspace architecture under the relevant regulations has slowed significantly under the OAR. For example, recently completed changes to airspace steps over Alice Springs, which have provided Qantas with enhanced safety and reduced fuel burn and emissions, took some two years to implement. Changes of a similar nature would previously have taken a few months. The industry perception is that the OAR is driven more by process than being reactive and pro-active in respect of the operational and safety needs of industry.

At the time Qantas raised concerns in relation to Alice Springs, we also proposed that airspace architecture at other locations (eg Hobart, Coolangatta) be similarly modified to reflect new generation aircraft performance. However, we were persuaded not to pursue additional location-specific changes in favour of establishment of a national generic airspace design model. This was also supported by other airlines.

However, this has not progressed, with OAR proposing that the periodic location-specific airspace audit process, over a number of years, will eventually capture any necessary change requirements. Qantas remains of the view that a generic airspace architecture design to capture the arrival and departure profiles of modern high performance aircraft, accepted by industry, should be the starting point of any airspace review, and that such a model would provide significant economies in labour and time, while minimising conflicts of interest between competing interests.

SLOT COMPLIANCE AT SYDNEY AIRPORT

The *Sydney Airport Demand Management Act 1997* enshrines a cap of 80 hourly movements and establishes a framework for a slot management scheme.

The Slot Management Scheme came into effect for the scheduling season beginning 29 March 1998, and the Compliance Scheme on 25 October 1998.

A slot allocated under the scheme permits a specified aircraft movement at a specified time on a specified day.

The establishment of a slot system in tandem with the runway hourly cap through legislation is intended to provide a clear long term guide to airlines and airport planners and ensure that the peak hour movements can be managed in a non-discriminatory and efficient manner.

The Department of Infrastructure, Transport, Regional Development and Local Government oversights administration of the Scheme. The Department chairs the Compliance Committee that assesses breaches of the slot scheme. Day to day administration of the Slot Scheme is undertaken by Airport Co-ordination Australia (ACA).

ACA reports to airlines on a weekly basis three categories of services:

1. Those which operated on time, i.e. within the allowable tolerances;
2. Those which operated off slot but are considered to have operated on time due to factors known to be outside the airline's control; and
3. Those which are initially deemed to be of-slot or no slot movements.

Airlines are expected to deliver delay reasons for the third category within seven calendar days of receiving the file from ACA. Reasons need to be provided in such a way that the Slot Compliance Committee can determine whether the delay reasons are within or outside an airline's control.

Processing an average week of "out of tolerance" operations to the standard of reporting required by the Compliance Committee requires one to 1.5 days per week work by a full time Qantas Group employee, as it requires reviewing a considerable amount of data. It is often very difficult to fulfil the seven-day (five working-day) turnaround, in view of other business priorities.

The reporting process has no influence on Qantas' on-time performance. Competition and customer service are far more important drivers of punctuality. That this is the case is supported by the fact that no fines have ever been levied since the introduction of the compliance scheme. It is also worth noting that when the legislation was introduced over a decade ago, there was no public transparency of domestic airline punctuality, while today monthly reporting occurs.

While there are a large number of congested airports around the world, the application of the process at Sydney airport is unique. At London Heathrow airport, which is congested for its full 17 hours of daily operations, a slot monitoring scheme exists where '"repeat offenders" are consulted and asked to report why they are consistently late.[9] If there is no response and/or action taken by the "offending" carriers, then a penalty of some sort may be applied, eg loss of slot. A similar scheme exists at Frankfurt airport. Both the Heathrow and Frankfurt schemes have been effective in gaining airlines' attention in addressing on-time performance issues without the need for burdensome delay reporting.

9 Further information is available at http://www.acl-uk.org/SlotSanctions.aspx**9**

DISABILITY DISCRIMINATION LEGISLATION

Airlines face competing issues around compliance with disability discrimination laws, protecting and ensuring the health and safety of airline staff, maintaining and enforcing civil aviation safety and compliance, while also guaranteeing aviation transport security.

Disability discrimination legislation in Australia exists at federal, state and territory level in the following statutes:

- *Disability Discrimination Act 1992* (Cth) and *Disability Standards for Accessible Public Transport 2002*
- *Human Rights and Equal Opportunity Commission Act 1986* (Cth)
- *Workplace Relations Act 1996* (Cth)
- *Anti-Discrimination Act 1977* (NSW)
- *Equal Opportunity Act 1995* (Vic)
- *Anti-Discrimination Act 1991* (Qld)
- *Equal Opportunity Act 1984* (WA)
- *Equal Opportunity Act 1984* (SA)
- *Anti-Discrimination Act 1992* (NT)
- *Discrimination Act 1991* (ACT)
- *Anti-Discrimination Act 1998* (Tas)

The disability discrimination legislation generally prohibits discrimination on the ground of disability or impairment in the provision of goods and services. Overall, it prohibits unlawful discrimination that occurs:

- in the provision of goods and services;
- when a person is treated less favourably;
- on the basis of a prohibited ground (e.g. their disability);
- causing real detriment; and
- where no exemption or defence applies (e.g. reasonableness or unjustifiable hardship).

All these elements must be present to establish unlawful discrimination.

Compliance with other legislation imposes requirements that at times conflict with the terms of the disability discrimination legislation, and this conflict places a significant burden on Qantas.

The Group considers that it can rely on the unjustifiable hardship defence where it is required to comply with competing legislation, in circumstances where it is not possible to comply with both pieces of legislation simultaneously. However, we consider that it is appropriate, reasonable and resource efficient that this issue be clearly addressed in the *Disability Standards for Accessible Public Transport 2002* (Transport Standards). The Transport Standards ought to contain a clear exemption in relation to compliance with civil aviation safety, occupational health and safety and aviation transport security legislation respectively.

This would result in time consuming and costly processes being avoided by all parties in cases where the airline is merely complying with its obligations under conflicting legislation as best we can.

Conflict with Civil Aviation Legislation

Qantas is bound to comply with the various aviation safety regulations and standards set out in:

- *Civil Aviation Act 1988*
- *Civil Aviation Regulations 1988*
- *Civil Aviation Safety Regulations 1998*
- *Civil Aviation Orders*

Exit row seating

Civil Aviation Order Part 20 Section 20.16.3, paragraph 15.2 provides that:

> "The carriage of handicapped persons in regular public transport or charter operations shall be in accordance with the following requirements:
>
> …
>
> (b) the operator shall ensure that handicapped persons are not seated in an aircraft where they could in any way obstruct or hinder access to any emergency exit by other persons on the aircraft".

The broad definition of "handicapped person" found in sub-section 2 of Section 20.16.3 provides as follows:

> "**Handicapped person**" is a "person requiring special attention because of illness, injury, age, congenital malfunction, or other temporary or permanent incapacity or disability which makes that person unable without special facilities or assistance to utilise air transport facilities and services as effectively as persons who are not so affected."

A conflict arises between the disability discrimination legislation and the civil aviation legislation where a passenger with a disability wishes to occupy an exit row seat to accommodate their disability due to the extra leg room such seats provide or personal preference. The airline, however, is prohibited from providing such a seat to a passenger with a disability by the civil aviation legislation.

To illustrate, a passenger may have a back disability which causes him or her serious pain, requiring regular relief by walking around the cabin of the aircraft, which might best be gained by sitting in an exit row seat. However, the passenger's self-description places him or her within the definition of "handicapped person". Equally, a passenger's obesity (which may be caused by a medical condition) may reduce that person's ability to quickly respond to an emergency by the effective use of aircraft facilities in the same manner as an able-bodied person, which would also bring such a person within the broadly defined meaning of "handicapped person".

Emergency exit doors are heavy and difficult to lift. Someone with a back injury or someone who is severely overweight is therefore unable to operate these doors with the same efficiency as an able-bodied passenger. For the same reason, elderly passengers come within the definition of "handicapped person", and are not able to travel in the emergency exit rows given their generally reduced strength.

In 1993 the Bureau of Air Safety Investigation (BASI) (as it then was, now the Australian Transport Safety Bureau) recommended[10] that the Civil Aviation Authority (now CASA) regulate to ensure that passengers seated in exit rows are capable and willing to conduct the functions with which they may be faced in an emergency or evacuation. That recommendation was based on accident experience and research in Australia and overseas, and also on regulations in force in the United Kingdom, Canada and the United States. Qantas has adopted this recommendation which is reflected in Qantas' policies applicable to the seating of customers with disabilities.

In response to the BASI recommendation, CASA proposed the following new provision to become part of the new CASA regulations (which we understand is still to be implemented):

> "Part 121A.260 (3)
>
> An operator must ensure that a person with reduced mobility is not allocated, nor occupies, a seat where his or her presence could:
> (a) impede the crew in their duties;
> (b) obstruct access to emergency equipment; or
> (c) impede the emergency evacuation of the aeroplane."

Clarity is needed to ensure that carriers can comply with their obligations under the civil aviation legislation, without concern that they will end up in courts and tribunals dealing with disability discrimination complaints to defend their position. It is an unnecessary drain on airline resources, especially when the civil aviation legislation with which Australian carriers are complying is in the interests of the safety of all passengers, including passengers with disabilities. Although there have been attempts to resolve the conflict via proposed legislation, the amendment only takes the first step in what should be a two-step process to appropriately address it.

An amendment to the *Civil Aviation Act 1988* has resulted in the introduction of section 98 (6B) which provides that "regulations may contain provisions that are inconsistent with the *Disability Discrimination Act 1992* if the inconsistency is necessary for the safety of air navigation".

While the amendment may make clear that civil aviation regulations may be inconsistent with the *Disability Discrimination Act 1992*, it does not then deal with how those inconsistencies will be resolved. Accordingly, this amendment has still not ensured that compliance with civil aviation legislation is a clear defence for carriers in response to claims of disability discrimination.

In Qantas' view, this amendment is only the first step to appropriately addressing the conflict between the civil aviation legislation and state and federal disability discrimination legislation. There is an exemption process under the *Disability Discrimination Act 1992* found in section 47(2) whereby "anything done by a person in direct compliance with a 'prescribed law'" is exempt from the operation of the general provisions prohibiting discrimination on the grounds of disability and sex. The civil aviation legislation should be included as a 'prescribed law' for the purposes of section 47[11], enabling direct compliance with civil aviation legislation to exempt compliance with the disability discrimination legislation.

10 Air Safety Recommendation Number R930258
11 The process for becoming a 'prescribed law' under the Disability Discrimination Legislation is pursuant to Regulation 2A and Schedule 1 of the Disability Discrimination Regulations 1996.

Qantas considers that such an exemption is reasonable in circumstances where we are simply complying with our obligations to ensure our paramount concern of passenger safety. It should be noted that, even with this exemption, a complainant's right to make a complaint has not been revoked. Equally, compliance with a regulation is only a defence where, if there is a choice, the operator has chosen the non-discriminatory means of compliance.

Carriage of assistance animals

The carriage of any animal, including a service animal, in the cabin of an aircraft is regulated by the *Civil Aviation Regulations 1988*. Civil Aviation Regulation 256A provides that the carrier may not carry any animal, other than a dog for the sight or hearing impaired, without the written consent of CASA. In providing its approval, CASA may impose conditions on the manner in which the service animal is carried in the cabin of the aircraft.

Sub-regulation 256A (8) of the Civil Aviation Regulations 1988 prohibits the carriage of animals "if carrying the animal is likely to affect a person in the aircraft in a way that may affect adversely the safety of the aircraft".

Even if regulatory approval is received, the airline may still need to decline the service animal's carriage due to safety considerations.

At the same time, to refuse carriage to a passenger with a disability wishing to travel with a service animal raises a potential breach of the disability discrimination legislation, unless the carrier can show that the refusal was reasonable in all the circumstances or that to carry the passenger and its animal would cause the airline an unjustifiable hardship.

In obtaining CASA approval and assessing its own safety requirements, airlines have two main considerations when reviewing a service dog's suitability to be carried in the aircraft cabin. The assessment of both these factors consumes considerable airline resources.

The first issue is the level of training the animal has received. To carry the animal without confirmation of its training levels may place cabin safety at risk. If the service animal cannot behave itself during the flight and disrupts the flight this raises concerns for safety in the cabin (including as a result of adverse reactions from fellow passengers in the cabin). The duration of many international flights make such behaviour in-flight particularly unacceptable and potentially unsafe. In addition, animals have the potential to hinder passengers and crew in emergency situations with serious negative consequences.

The second issue is to establish that the passenger has a disability requiring him or her to travel in the aircraft cabin with a service animal that *alleviates the effect of his or her disability* (or terms to this effect set out in the disability discrimination legislation referred to above). Establishing that the person has a disability that satisfies this test poses obvious difficulties for carriers. While a person who has a sight or hearing impairment may have an easily identifiable disability, passengers with psychological disabilities cannot be recognised as such by airline staff without proof of that disability (in the form of supporting documentation) being provided. Passengers with disabilities say that it is discriminatory for the airline to request such information.

There are an increasing number of requests for passengers to travel with animals known as “psychological assistance animals” or “comfort animals”. These animals are trained to assist a person with a psychological disability or impairment to cope in stressful situations. The animals receive some training, but the challenge for CASA and airlines alike lies in establishing the assistance animals’ true purpose and whether its level of training is appropriate for carriage within the cabin of an aircraft, especially on a long-haul flight.

Other considerations that airlines must consider in the carriage of animals in the cabin are the comfort of other passengers (especially where passengers suffer from allergies to animals), as well as issues of general hygiene in the passenger cabin, which is a food service and consumption area.

The carriage of assistance animals in an aircraft cabin raises complicated issues that need to be addressed at a federal level, so that the Qantas Group is not faced with different legislative requirements (see the Victorian Law Reform Commission’s recommendations regarding assistance animals) and different systems for recognising accreditation of assistance animals in different states and territories throughout Australia. The particular issues raised by assistance animals being in an aircraft cabin, as opposed to travelling on other forms of transport (that may be exited immediately if problems arise), need to be taken into account. Consideration should also be given to an assessment of the appropriate training levels of assistance animals required for in-cabin travel as well as guidelines around when it is appropriate to consider an animal to be *alleviating the effects of a disability* rather than merely providing comfort to the person with a disability.

Conflict with Aviation Transport Security Legislation

<u>Prohibited Items</u>

Regulation 1.07 of the *Aviation Transport Security Regulations 2005* includes in its list of “prohibited items” in item 2 “pointed metal scissors”. In addition, sub-regulation (12) of Regulation 1.07 prescribes that:

- “a pair of scissors with blades more than 6cm long, or a pair of manicure scissors, is a prohibited item; but
- a pair of blunt-ended or round-ended scissors with blades less than 6cm long is not a prohibited item”.

People with certain physical disabilities often self-catheterise to toilet and therefore need to carry sharp scissors past the security screening area into the sterile area and/or on board the aircraft to enable them to cut the catheter tube. As the tube needs to remain sterile, they cannot be cut in advance of the passenger’s travel. Blunt-ended or round-ended scissors are not sharp enough to effectively cut these tubes. Given the aviation security aims of the aviation transport security legislation, exceptions to these rules to accommodate such requests are not possible. The regulations do not allow for cabin crew members to be entrusted to carry the passenger’s scissors on board as the regulations are equally applicable to the crew.

Hypodermic needles (whether or not attached to syringes) are also listed in the “prohibited items” in item 2 of Regulation 1.07. People who have diabetes obviously need to travel with such needles. There is an exemption found at sub-regulation (6)(b) of Regulation 1.07 which provides that “a hypodermic needle is not taken to be a prohibited item if the person carrying it shows proof that it is medically necessary for the use of the person or another person who is in the person’s care”.

While this exemption addresses the immediate conflict, the requirements raise additional issues as to how that exemption should be managed by airlines and their staff, which are not addressed in the regulations. In particular, airlines face complaints from passengers who wish to carry all their hypodermic needles with them in the cabin of the aircraft (which is understandable given their value to the passenger), while airlines are expected, in line with the aims of the aviation transport security legislation, to keep the number of hypodermic needles carried on board to the medically necessary minimum.

Security Screening of Mobility Aids

The aviation transport security legislation has had an impact upon the airline's ability to return a passenger's mobility aid to them in a timely manner. The sophistication of electric wheelchairs gives people a greater level of independence. Understandably, the majority of people who travel with a mobility aid insist that they be allowed to stay in their mobility aid for as long as possible. Accordingly, Qantas amended its Mobility Aid Policy in late 2005 to provide passengers with the choice of surrendering their wheelchair at the departure gate or at check-in, along with the choice of receiving their mobility aid at the arrival gate or the baggage carousel in the destination port. However, this revised policy has led to passenger complaints that it takes too long for mobility aids to be returned to them. This requires Qantas to manage complaints and negative media on an ongoing basis.

The delays in relation to bringing a passenger's mobility aid to the gate upon arrival occur because it can often reasonably take up to 25 to 30 minutes to achieve this, depending on the aircraft type and the airport. This is due to the logistics of unloading the wheelchair from the aircraft, taking it to the baggage reclaim area, passing it through the security screening point and then travelling the (often significant) distance to the arrival gate.

One of the contributing factors to the length of the process relates to the requirement to re-screen the mobility aid upon arrival. Regulation 3.20 (3)(g) of the *Aviation Transport Security Regulations 2005* provides that the responsible screening authority must ensure that goods (which would include a mobility aid) "that enter the sterile area are screened and cleared". When the mobility aid is brought to the arrivals hall, it re-enters the security sterile area of the airport terminal, requiring it to be re-screened in compliance with Regulation 3.20 (3)(g). This is so, even though the mobility aid was screened before it was placed into the aircraft's hold.

Conflict with Occupational Health and Safety Legislation

Occupational Health and Safety legislation exists at federal, state and territory levels as follows:

- *Occupational Health and Safety Act 1991 (Cth)*
- *Occupational Health and Safety Act 2000 (NSW)*
- *Occupational Health and Safety Act 2004 (Vic)*
- *Workplace Health and Safety Act 1995 (Qld)*
- *Occupational Health, Safety and Welfare Act 1986 (SA)*
- *Occupational Health and Safety Act 1984 (WA)*
- *Occupational Health and Safety Act 1989 (ACT)*
- *Work Health Act (NT)*
- *Workplace Health and Safety Act 1995 (Tas)*

In general terms, an employer has an obligation to ensure the health, safety and welfare at work of all of its employees and other persons at its place of work. The carriage of passengers who use electric wheelchairs (and in some cases, electric scooters) raises some challenges for airlines, passengers and airline staff.

Generally, the principal defence to these obligations is that it was not reasonably practicable to comply with them.

Carriage of mobility aids

At the same time as the number of passengers with disabilities (in particular passengers who use wheelchairs) who undertake air travel - including regular air travel for business - has steadily increased, so has the sophistication, weight and dimensions of these wheelchairs.

Manufacturers of wheelchairs recommend that they must not be laid on their side but rather carried in the upright position. The average size of an electric wheelchair in the upright position is usually outside the dimensions of the aircraft hold of a narrow-bodied aircraft. Electric scooters can be the size of small golf buggies and some will simply not fit through the cargo doors of narrow body aircraft, regardless of the position in which they are stowed.

In Qantas' experience, the average weight of an electric wheelchair is anywhere between 80 and 180 kilograms. Once these wheelchairs are dismantled or placed on their side, they become a dead weight and become more difficult to transport within airport facilities and almost impossible to safely manoeuvre within the aircraft hold. As a mechanical solution to accommodate the lifting of such heavy, yet fragile, machinery has not been achieved to date, concerns regarding the safety of airline airport staff have meant that limitations have had to be placed on the size dimensions of electric wheelchairs that may be carried on narrow-bodied aircraft.

While Qantas is comfortable that it is able to defend any claims brought under disability discrimination legislation based on the defences available under that legislation, it would clearly be preferable for it not to have to fund such a defence in order to establish that it is dealing appropriately with conflicting legislation.

Until recently in Australia, passengers who have severe to reduced mobility limitations or disabilities required manual lifting to be transported by air. Passengers who use wheelchairs and who are not mobile generally require assistance from airline staff in transferring from their own wheelchairs into airline wheelchairs or into airline aisle wheelchairs (which have been specially designed to travel down the narrow aisle of an aircraft), or both, before being transferred again into their aircraft seat.

This gives rise to a conflict between an airline's obligations to its staff and to passengers with disabilities, respectively, in relation to the manual transfer of passengers into aircraft seats. Qantas has worked with a lifting manufacturer to find a mechanical solution in the form of an Eagle Lifter. The Eagle Lifter has the capability to transfer passengers out of their own wheelchairs and into aircraft seats and vice versa, both in wide and narrow-bodied aircraft, without significant manual handling risks.

While this is an important breakthrough in addressing the manual handling issues faced by airline staff in assisting passengers with disabilities, there will always be instances where manual handling is unavoidable. Accordingly, the issue still remains – although to a reduced extent – as to where the balance should lie between competing legislative requirements (and good corporate social responsibility) in circumstances where employees are put at risk of serious injury in order to provide accessibility to air travel for passengers who use wheelchairs, eg transferring a passenger weighing in excess of 100kg with a Sling or Slideboard into an aircraft seat within the awkward and restricted space of an aircraft cabin.

In these circumstances, the Qantas Group faces the potential for complaints, claims and ultimately litigation in relation to alleged liability for an employee's injury, refusal to carry the passenger for safety reasons and/or liability for injury to the passenger. The claims may arise either as a result of the manual handling of the passenger or the refusal to transfer the passenger to ensure the staff member's safety.