

# Chapter 2

## Background

### Introduction

2.1 Late in 2006, a private equity consortium, Airline Partners Australia Limited (APA), announced that it proposed to acquire Qantas Airways Limited (Qantas). APA's proposed acquisition of Qantas must comply with the *Qantas Sale Act 1992* (the Act). However, some persons and organisations have expressed concerns about the implications of the proposed takeover for Qantas subsidiaries, particularly Jetstar Airways.

2.2 The Qantas Sale (Keep Jetstar Australian) Amendment Bill 2007 (the bill) seeks to address these concerns. This Chapter provides some background material in order to give context to the bill and the issues raised in submissions. First, it gives an outline of the provisions of the bill and the national interest safeguards in the Qantas Sale Act. It then looks at the implications of the proposed Qantas sale for Jetstar as identified in the media and briefly outlines proceedings established to consider aspects of the proposed sale. Finally, it examines the Deed of Undertaking signed by the Government and Airline Partners Australia.

### Provisions of the bill

2.3 The bill seeks to add additional subsections to section 9 of the Qantas Sale Act to require Qantas to ensure that:

- Qantas and associated entities (that is, Jetstar)<sup>1</sup> continue to locate their head offices and facilities such as catering and maintenance in Australia (proposed paragraphs 9(5)(a) and (b));
- at least two-thirds of the boards of Qantas and associated entities are Australian citizens (proposed paragraph 9(5)(c)); and
- an Australian citizen presides over any meetings of the boards of directors of Qantas or associated entities (proposed paragraph 9(5)(d)).

2.4 Proposed subsection 9(6) would also prohibit Qantas and associated entities from seeking to avoid these requirements.

2.5 The bill's provisions mirror to some extent the 'national interest safeguards' in Section 7 of the Act except they place requirements on Qantas to ensure certain things in relation to itself and its associated entities, whereas Section 7 specifies various provisions (the 'mandatory articles') that must be included in Qantas' articles of

---

1 Proposed subsection 9(8) provides that 'associated entity' is to be determined in the same manner as that question is determined under the *Corporations Act 2001*.

association. The committee will now turn to the Qantas Sale Act and will also consider the national interest safeguards in the Act.

### ***Qantas Sale Act 1992***

2.6 The Qantas Sale Act contains the legislative and administrative framework that enabled the sale of Qantas.<sup>2</sup> It took account of different possible outcomes for the sale process, including the fact that varying levels of ownership could be sold during the 'trade sale' process prior to the ensuing public float.

2.7 The Act also reflects key sale requirements relating to the following:

- national interest safeguards required with the sale of 100 per cent of Qantas;
- recapitalisation of Qantas;
- reconstruction of its debts in preparation for the change of ownership; and
- terms and conditions of employment for its staff.

2.8 The bulk of the Act is concerned with the removal of both Qantas and Australian Airlines from the ambit of a variety of Commonwealth legislation so that, post sale, the expanded Qantas group would be treated the same as other private sector enterprises generally. The part of the Act that continues to be relevant today and by which Qantas is bound is Part 3 which contains the 'national interest safeguards'.

### ***Part 3—Requirements regarding Qantas' articles of association***

2.9 Section 7 in Part 3 of the Act, specifies certain provisions that must be included in Qantas' post-sale articles of association. Currently,<sup>3</sup> these:

- impose restrictions on the issue and ownership (including joint ownership) of shares in Qantas so as to:
  - prevent **foreign persons** from having relevant interests in Qantas shares that represent in total, more than 49 per cent of the total value of issued share capital of Qantas (paragraph 7(1)(a));
  - prevent **foreign airlines** from having relevant interests in shares in Qantas that represent, in total, more than 35 per cent of the total value of the issued share capital of Qantas (paragraph 7(1)(aa)); and
  - prevent **any one foreign person** having relevant interests in shares in Qantas that represent more than 25 per cent of the total value of the issued share capital of Qantas (paragraph 7(1)(b)).

---

2 Second Reading Speech, Minister for Finance, the Hon. Ralph Willis, 4 November 1992, House Hansard p. 2588.

3 Section 7 has been amended several times since the Act was passed in 1992. The most significant amendments are contained in the *Qantas Sale Amendment Act 1995*.

Other provisions that must be included in the articles of association include provisions:

- limiting the number of foreign directors (at least two-thirds must be Australian citizens) (paragraph 7(1)(i)) and denoting who can vote for them (paragraph 7(1)(c));
- requiring that the director presiding at a meeting of the board of directors is an Australian citizen (paragraph 7(1)(j));
- preserving the name of 'Qantas' in the company name (paragraph 7(1)(e)); and for the company's scheduled international air transport passenger services (paragraph 7(1)(f));
- stipulating that Qantas' head office be located in Australia (paragraph 7(1)(g)) and that it be incorporated within Australia (paragraph 7(1)(k)); and
- requiring the principal operational centre for Qantas facilities used in the provision of scheduled international air transport services (eg facilities for the maintenance and housing of aircraft, catering, flight operations, training and administration) to be in Australia (paragraph 7(1)(h)).

### **Proposed Qantas sale**

2.10 In February 2007, APA lodged a bidder's statement setting out the terms of its offer for Qantas. This offer closes on 3 April 2007 (unless extended or withdrawn).<sup>4</sup> APA made a commitment in its bidder's statement that Qantas will remain majority Australian-owned and controlled, as required by the Qantas Sale Act.

2.11 Although the Qantas Sale Act places a number of restrictions on Qantas, including restrictions on foreign ownership and control, some have raised concerns about the application of the Qantas Sale Act to Qantas subsidiaries such as Jetstar.

### ***About Jetstar Airways***

2.12 Jetstar describes itself as 'Australia's and Singapore's low fares airline for Australia and Asia-Pacific'.<sup>5</sup> Jetstar's Australian operation is wholly owned by Qantas, but is managed separately and operates independently. Jetstar's Australian headquarters are in Melbourne. Jetstar's intra Asian operation is a Singapore-based partnership which includes Qantas.<sup>6</sup>

---

4 <http://www.airlinepartnersaustralia.com.au/> (accessed 6 March 2007); see also Trevor Chappell, 'Qantas soars on takeover bid: Private group targets icon' *The Canberra Times*, 23 November 2006, p. 17.

5 Jetstar, 'Our Company', at <http://www.jetstar.com/about-us/our-company.html>, (accessed 6 March 2007).

6 Qantas, 'About Qantas – Our company – Subsidiary companies - Jetstar' at: <http://www.qantas.com.au/info/about/subsidiaries/index> (accessed 5 March 2007).

2.13 Jetstar started flying within Australia in May 2004, and within Asia just over six months later. It began international long haul flights from Australia to Asia in November 2006.<sup>7</sup>

#### *Application of the Qantas Sale Act to Jetstar*

2.14 Media reports suggest that the requirements of the Qantas Sale Act do not apply to subsidiaries of Qantas, including Jetstar.<sup>8</sup> Legal advice given to the government indicates that, although Jetstar is owned and operated by Qantas, it is a separate legal entity, managed largely independently and operates in its own right. The advice concluded that, as a result, the provisions of the Qantas Sale Act do not apply to Jetstar. The Department of Transport and Regional Services confirmed this at the public hearing.<sup>9</sup>

2.15 If the provisions of the Qantas Sale Act do not cover Jetstar, there is a concern that Jetstar could be used as a device to move jobs and operations offshore.<sup>10</sup> In his second reading speech to the bill, Senator Fielding stated his concern that:

...there is nothing to prevent Jetstar being sold off to overseas buyers, and jobs and operations being sent offshore, if the Qantas takeover succeeds.<sup>11</sup>

2.16 For example, it has been reported that unions are fearful that Qantas will use Jetstar on regional services, and hire cheaper overseas-based cabin crew to staff Jetstar's international service. Similarly, there are concerns that conditions imposed on Qantas to keep maintenance operations in Australia would not apply to Jetstar.<sup>12</sup>

#### *Related proceedings*

2.17 The Australian Competition and Consumer Commission has examined the proposed Qantas takeover. It did not oppose the proposed acquisition, on the basis that it would be unlikely to substantially lessen competition in any relevant market (which would be in contravention of section 50 of the *Trade Practices Act 1974*).<sup>13</sup>

---

7 Qantas, 'About Qantas – Our company – Subsidiary companies - Jetstar' at: <http://www.qantas.com.au/info/about/subsidiaries/index> (accessed 5 March 2007).

8 Matthew Drummond, 'Qantas bid loophole to test Costello', *Australian Financial Review*, 8 February 2007, p. 1; also David Crowe and Matthew Drummond, 'Jetstar loophole row heats up', *Australian Financial Review*, 9 February 2007, p. 5.

9 *Proof Committee Hansard*, 13 October 2006, pp. 48–49. [Mr Mrdak]

10 Matthew Drummond, 'Qantas bid loophole to test Costello', *Australian Financial Review*, 8 February 2007, p. 1.

11 *Senate Hansard*, 27 February 2007, p. 31.

12 Mark Skulley and Matthew Drummond, 'Pilots throw a legal spanner in the works', *Australian Financial Review*, 26 February 2007, p. 9.

13 See ACCC Media release, 1 March 2007, 'ACCC not to oppose proposed acquisition of Qantas Airways Limited by Airline Partners Australia Limited', at: <http://www.accc.gov.au/content/index.phtml/itemId/781807> (accessed 6 March 2007).

2.18 The Federal Court is also currently considering the application of the Qantas Sale Act to Jetstar. On 26 February 2007, the Australian and International Pilots Association launched legal proceedings in the Federal Court alleging that Jetstar's international services breach the Qantas Sale Act. More specifically:

The Federal Court proceedings allege that Jetstar's fast-growing international services breach section 7(f) of the Qantas Sale Act, which prevents Qantas from operating scheduled international passenger services under any brand other than Qantas.<sup>14</sup>

2.19 The timeline of this case is unclear, although the Australian and International Pilots Association is apparently seeking to have it brought forward.<sup>15</sup>

### ***Deed of Undertaking***

2.20 The Foreign Investment Review Board (FIRB) has considered the proposed acquisition under the *Foreign Acquisitions and Takeovers Act 1975* and reported to the Treasurer. Based on the FIRB's report, the Treasurer concluded on 6 March 2007 that 'there are no objections under the Foreign Acquisitions and Takeovers Act or foreign investment policy for the bid to proceed'.<sup>16</sup>

2.21 At the same time, the Treasurer and Minister for Transport and Regional Services announced that they had negotiated and received a legally enforceable 'Deed of Undertaking' from APA.<sup>17</sup> Key provisions of the Deed relevant to the bill, include undertakings that:

- Qantas and Jetstar Airways brands will be maintained both locally and internationally (paragraph 5.5(a) of the Deed of Undertaking);
- Qantas and Jetstar Airways will expand internationally and within Australia to provide a sustainable mix of full service and value based offerings in line with market needs (paragraph 5.5(d));
- the Qantas Group (defined in the Deed to include Qantas and its subsidiaries) will offer an integrated network of international, domestic and regional air transport services (paragraph 5.5(e));

---

14 Mark Skulley and Matthew Drummond, 'Pilots throw a legal spanner in the works', *Australian Financial Review*, 26 February 2007, p. 9.

15 Matthew Drummond, 'Jobs 'may still be lost'', *Australian Financial Review*, 7 March 2007, p. 10.

16 The Hon Peter Costello MP, Treasurer, Transcript of Joint Press Conference with the Hon Mark Vaile MP, Deputy Prime Minister and Minister for Transport and Regional Services, Parliament House Canberra, 6 March 2007, p. 1.

17 The Hon Peter Costello MP, Treasurer, media release, 6 March 2007, 'Qantas Airways Ltd', <http://www.treasurer.gov.au/tsr/content/pressreleases/2007/009.asp> (accessed 7 March 2007); The Deed is at: [http://www.treasurer.gov.au/tsr/content/downloads/009\\_Attachment.pdf](http://www.treasurer.gov.au/tsr/content/downloads/009_Attachment.pdf) (accessed 7 March 2007).

- the Qantas Group will support regional capacity growth and regional network improvement in line with market needs (paragraph 5.5(f));
- the current review of Qantas Engineering's maintenance, repair and overall operations will continue, 'with a view to building on existing capabilities for wide and narrow body maintenance to create an onshore, globally competitive in-house operation' (paragraph 5.5(g));
- the Qantas Group's track record of offering competitive conditions, jobs growth, career opportunities and extensive apprenticeship training will continue in line with market conditions (paragraph 5.5(h)); and
- the facilities used by the Qantas Group (including facilities for maintenance, catering, training and administration) in the provision of scheduled services must represent the principal operational centre for the Qantas Group when compared with those located in any other country (paragraph 5.1(h)).

2.22 Clause 6 of the Deed provides for the Commonwealth to enforce the Deed in the event of a possible breach.

2.23 Clause 2.3 of the Deed affirms APA's statements in relation to the acquisition of Qantas, including that it:

- plans to keep the Qantas and Jetstar brands and has no intention to break up the airline;
- has no intention to reduce regional services; and
- supports Qantas' existing strategy of continuing maintenance operations in Australia.