Chapter 3

Evidence in relation to the bill

3.1 Generally, submissions received from unions and associations support the bill, although some made suggestions for its amendment. Qantas Airways Limited and Airline Partners Australia Limited consider that the bill is unnecessary because of safeguards that already apply to Qantas and Jetstar in legislation and government policy. Furthermore, they consider that the binding Deed of Undertaking signed by the Government and the private equity bidders broadens the coverage of existing legislation to embrace all aspects of Qantas including its subsidiary Jetstar. However, some contributors to the inquiry dispute the efficacy of clauses in the Deed and also whether its terms are in fact enforceable.

3.2 The committee was conscious of the terms of reference referred to it by the Senate - that is, the Senate referred the bill and not a more wide ranging inquiry about the merits or otherwise of the private equity bid for Qantas. Therefore, in this Chapter, the committee focuses on considering the evidence as it applies directly to the bill with a view to assisting the Senate to decide whether or not it should pass the bill.

3.3 Accordingly, the committee first considers whether the bill is necessary. To do this it asks whether the Qantas Sale Act already applies to Jetstar and other Qantas companies. It then turns to the question of whether other legislation or the Deed of Undertaking make the bill redundant. Next the committee looks at the broad scope of the bill and whether it will in fact do what it purports to do. In this section the committee particularly focuses on the effects of the phrase 'associated entity', which appears at a number of lines in the bill.

3.4 The committee then turns specifically to provisions of the bill in proposed subsection 9(5) of the Qantas Sale Act and discusses the evidence received in relation to: the location of offices and facilities; and foreign ownership issues of the Qantas Group. Finally, the committee touches on other drafting issues raised in submissions and draws its conclusions, making a recommendation to the Senate about whether or not to pass the bill.

Does the Qantas Sale Act apply to Jetstar and other Qantas companies?

3.5 This bill is intended to impose similar national interest safeguards on Qantas' associated entities to those imposed on the Qantas parent company through Section 7 of the Qantas Sale Act. It is therefore based on the assumption that the Qantas Sale Act does not currently apply to Jetstar and other Qantas companies. As noted above, this bill would not be necessary if associated companies were already encompassed by the Qantas Sale Act.

3.6 The majority of evidence received by the committee, including advice from the Department of Transport and Regional Services, is that the Act does not extend to

subsidiaries such as Jetstar. However, this is a view not held by all contributors to the inquiry.

3.7 For example, the Transport Workers Union of Australia (TWU) asserted in its submission that 'it has always been Parliament's intent for Qantas companies to be subjected to the terms and character of Section 7' of the Qantas Sale Act.[1] The TWU submits that the bill should 'close the loophole that would let Qantas, under any ownership structure, circumvent the intent of Parliament in passing the Act'. The TWU argues that if the Parliament were to pass the bill, the matter would be beyond question.

3.8 The alternative viewpoint is taken by Qantas which argues that at the time the Qantas Sale Act was passed it was open to Parliament to impose the requirements in the Act on Qantas Airways Limited and its subsidiaries. However 'it was a conscious decision not to apply Part 3 to Qantas subsidiaries as this would have affected the operation of Australia Asia Airlines Limited which was the Qantas subsidiary operating international services in 1992 between Australia and Taiwan'.[2]

3.9 The committee noted that Part 3, which contains the national interest safeguards, does not refer to Qantas subsidiaries. Mr Brett Johnson, General Counsel, Qantas, pointed out at the public hearing that the Qantas Sale Act defines both 'Qantas' and 'Qantas subsidiary' and that the term 'Qantas subsidiary' is used in a number of places in the Act. Mr Johnson argued that the then Government had been specific about where it intended the Act to apply to subsidiaries:

> There is a definition of Qantas which states ‘Qantas’ is ‘Qantas Airways Ltd’. There is a definition right below that of ‘Qantas subsidiary’, and that is any Qantas subsidiary as defined by the Corporations Act. In other parts of the act where the government intended it would apply to Qantas and its subsidiaries, the words ‘Qantas’ and ‘Qantas subsidiaries’ are used.[3]

3.10 The Australian and International Pilots Association (AIPA) agrees that the Act does not apply to Qantas subsidiaries, and told the committee it had legal advice which confirms this view.[4] The AIPA was therefore concerned that the safeguards in the Qantas Sale Act could be avoided by Qantas transferring its business to a subsidiary such as Jetstar. The AIPA accordingly supports the bill, believing that it would protect 'employees, Qantas and the public'.[5]

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1 TWU, *Submission 4*, p. 4.

2 Qantas Airways Limited, *Submission 6*.

3 *Proof Committee Hansard*, 13 March 2007, p. 10.

4 *Opening Statement*, Tabled 13 March 2007, paras 15-18.

5 AIPA, *Submission 10*, p. 1.

3.11 The AIPA also informed the committee that one of its members had commenced an action in the Federal Court to clarify the intent of the Qantas Sales Act.[6]

3.12 Representatives of the Department of Transport and Regional Services advised the committee that in their opinion, the Qantas Sale Act does not apply to Jetstar or other Qantas subsidiaries. Questioned further about whether this meant that Qantas could shift its operations to a subsidiary like Jetstar and move those operations offshore, representatives said that this was not the case:

> Jetstar will always have to operate within the parameters of the Air Navigation Act and the requirements for an Australian international airline licence to be designated as an Australian carrier. If Jetstar were seeking to operate as an Australian international carrier and to be designated as an Australian international carrier, its operational base would have to be in Australia; its head office would have to be in Australia. …To operate as an Australian international carrier it must meet the requirements of the Air Navigation Act and the government's requirements in relation to airline licensing and designation.[7]

Is the bill necessary?

3.13 Submissions and witnesses were divided about whether the bill was necessary. On one side, the unions and associations see the possibility of Qantas using Jetstar to avoid the restrictions in the Qantas Sale Act, and that therefore the bill is important to prevent that from occurring. The adequacy of the Deed of Undertaking, as well as its enforceability, were also canvassed in submissions and at the hearing. On the other side, APA and Qantas argue that the protections proposed by the bill already exist both in legislation and Government policy. Further, the Deed of Undertaking provides legally enforceable undertakings by the private equity partners.

Legislative protections

3.14 Mr Somerville of the AIPA told the committee that there is a possibility of Qantas shifting operations to Jetstar.[8] He asserts that the process of Qantas transferring assets and business to Jetstar has already begun:

> …as routes transfer from Qantas to Jetstar; as we find that Australian Airlines wet leasing is now flying white aircraft with red trails. I am not sure if you have flown on any of those flights, but I wonder if you have been able to notice that difference. This is not something that is going to happen overnight; it will happen over a period of time. It is not a matter of whether the Australian public could seriously countenance it. If it happens

6 *Opening Statement*, Tabled 13 March 2007, para 19.

7 *Proof Committee Hansard*, 13 March 2007, p. 49. [Mr Mrdak]

8 *Proof Committee Hansard*, 13 March 2007, p. 25.

> in steps, it can certainly happen, and it is already happening. It does not need to be done in a big bang way.[9]

3.15 When Senator Fielding questioned Qantas about the transfer of seat capacity to Jetstar, Group General Manager, Mr Hawes told the committee that it is by the diversification and flexibility of the Jetstar product that Qantas has been able to increase jobs and it is part of the Qantas competitive strategy to continue the Jetstar growth:

> But to say that that is avoiding or seeking to get around the Qantas Sale Act is not a correct proposition either. There is a flexibility there which the company is clearly pursuing, but it is pursuing that within a regulatory environment which requires that the Jetstar operations be majority Australian owned and take place in Australia.[10]

3.16 Qantas stated that 'while Qantas has no objection, in principle, to the intention of the bill, it is just not required. Qantas did not establish Jetstar with the intention of circumventing the provisions of the Qantas Sale Act.'[11]

3.17 Qantas argues that the protections that exist in the Qantas Sale Act already ensure that the majority of facilities used by the Qantas Group in its international operations are in Australia.[12] Specifically in relation to Jetstar, Mr Hawes told the committee that although it is an important and growing part of the Qantas Group it will never be the same size as Qantas and therefore the bill is not required. Qantas also stressed that Jetstar was not established in 2004 with the intention of circumventing the Qantas Sale Act and the vast bulk of Jetstar's employees and the facilities used to support its operations are based and will continue to be based in Australia:

> Jetstar is a wholly owned Australian incorporated subsidiary operating valued based services predominantly to leisure destinations. It is an integral part of the Qantas group growth strategy. Jetstar's success in the Australian market has enabled its model to be extended and adapted to operate internationally, including, as from last November, on long-haul international routes.[13]

3.18 Additionally, to operate international services, Jetstar must be designated by the Australian government to be permitted to use Australian air service rights.[14] It must comply with the provisions of the *Air Navigation Act 1920*, which amongst other things, requires it to be 51 per cent Australian owned. As well as the requirements of the Air Navigation Act, Australia's international air services agreements require that

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9 *Proof Committee Hansard*, 13 March 2007, p. 25.

10 *Proof Committee Hansard*, 13 March 2007, p. 4.

11 Qantas Airways Limited, *Submission 6*.

12 *Proof Committee Hansard*, 13 March 2007, p. 3.

13 *Proof Committee Hansard*, 13 March 2007, p. 2. [Mr Johnson]

14 *Proof Committee Hansard*, 13 March 2007, p. 2. [Mr Johnson]

Jetstar be either substantially owned and effectively controlled by Australians, or incorporated and have its principal place of business in Australia, or a combination of these criteria.

3.19 Jetstar must continue to meet these requirements to be designated by Australia and accepted by other countries as an Australian carrier. These provisos ensure that it can access the full complement of Australian and international air service agreements. Mr Johnson. General Counsel, Qantas, told the committee that as an absolute minimum, Jetstar must maintain its head office in Australia, have a majority of Australian directors and an Australian chair. He considers that these requirements cover three of the four provisions proposed by the bill.

3.20 Mr Mrdak, Deputy Secretary, Department of Transport and Regional Services, told the committee that 'there is some uncertainty about whether the provisions in the bill as currently drafted do anything more than what is already being provided for under the existing legislation and under the deed of undertaking in terms of ensuring that the company is looking to grow the business and that the statutory obligations are being met.[15]

Deed of Undertaking

3.21 A number of witnesses were critical of the Deed of Undertaking. The AIPA argued that it 'adds very little, is virtually meaningless and gives few, if any additional safeguards to the Qantas Sale Act.'[16] Mr Somerville, General Manager, AIPA raised the issue of the Deed's enforceability as a concern. He argued that the stated intentions of APA in the Deed are not fully reflected in Clause 5[17] which is the undertakings section of the document. Further, Additional Undertakings in Clause 5.5 are phrased in terms of 'plans and strategies'. Mr Somerville suggests that these additional undertakings are 'plainly unenforceable'.

3.22 Mr Somerville told the committee that the bill is an important means of safeguarding the sale of Qantas.[18]

3.23 Mr Swan, National Industrial Officer, Australian Workers Union, stated that the 'APA deed is manifestly inadequate'.[19] He considers that the Deed is largely a recitation of undertakings or obligations that are mandated by the Qantas Sale Act, however, it also includes some 'troubling caveats'. In particular he is concerned about future apprenticeships programs whose provision will depend on 'market conditions', a term that concerns Mr Swan:

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15 *Proof Committee Hansard,* 13 March 2007, p. 51.

16 *Opening Statement*, Tabled 13 March 2007, para 12.

17 *Proof Committee Hansard,* 13 March 2007, p. 19.

18 *Proof Committee Hansard,* 13 March 2007, p. 16.

19 *Proof Committee Hansard,* 13 March 2007, p. 40.

It is certainly not a legal term that one can readily point to precedence on.[20]

3.24 One of the issues raised about the Deed is that it is only binding upon the named parties, that is APA, TrusteeCo and the Government.[21] Once APA and TrusteeCo relinquish their controlling interest in Qantas, the Deed will have no effect.

3.25 Airline Partners of Australia Limited (APA) asserts in its submission that the Deed of Undertaking is in substantially the same terms as the proposed amendments to the Qantas Sale Act contained in the bill.[22] It therefore precludes the need for additional legislation to protect Australian jobs and operations as the bill proposes.

3.26 Although the Deed expires at the point where APA no longer has a controlling interest in Qantas, Mr Johnson, Qantas General Counsel, suggested that this provides the Government with flexibility and an ability to adjust the undertakings to changed conditions because it will have an opportunity under foreign investment and other guidelines to review any requirements that it considers appropriate.[23] The committee notes that the Air Navigation Act and other legislation will continue to apply.

3.27 Representing the Department of Transport and Regional Services, Mr Mrdak stated that the Deed provides more extensive reporting obligations on the company in relation to its activities than those that are currently in place with Qantas,[24] and in some cases the reporting provisions go further than what would be expected from a publically listed entity.[25] He said that this will provide the Department with a basis for advising government on meeting the statutory obligations under the Qantas Sale Act.

Scope of the bill – associated entities

3.28 The bill seeks to impose requirements on Qantas and 'each associated entity'. The use of the term 'each associated entity' is included to ensure that the bill applies not just to Qantas, but also Jetstar and any other company associated with Qantas. Clause 8 of the bill provides that associated entities are to be determined in the same manner as that question is determined under the *Corporations Act 2001*.

3.29 However, some contributors to the inquiry considered that the use of this term may have unintended consequences, extending the reach of the bill beyond Jetstar to

20 *Proof Committee Hansard*, 13 March 2007, p. 40.

21 AMU, *Submission 9*, p. 7.

22 APA, *Submission 2*, p. 2.

23 *Proof Committee Hansard*, 13 March 2007, p. 6. Mr Mrdak, DOTARS makes a similar point at *Proof Committee Hansard*, 13 March 2007, p. 50.

24 *Proof Committee Hansard*, 13 March 2007, p. 50.

25 *Proof Committee Hansard*, 13 March 2007, p. 52.

companies with whom Qantas has a more tenuous association. This consequence appears to arise out of the definition of 'associate' in the Corporations Act.[26]

3.30 The APA for example advises that the bill provides an extremely wide definition that 'goes much further than that required to meet the stated purposes of the bill'.[27] The APA suggests that the restrictions in the bill could apply to many Qantas associated entities to whom application of the restriction would be inappropriate and unintended. It provides the following examples of companies that would be caught by the bill's provisions:

> Orangestar, a company based in Singapore that operates two subsidiary airlines, Jetstar Asia and Valuair, in which Qantas has only a 45% ownership interest, and Air Pacific Limited, Fiji's national carrier, in which Qantas has a 46.3% interest.[28]

3.31 Consequently, APA argues that the proposed restrictions in the bill may unnecessarily restrict Qantas' investment in offshore airlines and other businesses, and would cause undue disruption to the existing legitimate business activities of off-shore entities in which Qantas has invested.[29] The APA claims that this would restrict Qantas' growth, including employment growth opportunities. APA considered that the bill should be amended to replace references to 'associated entity' with a reference to 'Jetstar Airways'.[30]

3.32 In its submission and evidence, Qantas also took issue with the use of the term 'associated entities'. It considers that if the bill is enacted, it 'runs the real risk of forcing Qantas to materially change its current operations'.[31] Not only would the current drafting force Qantas to dispose of its shareholdings in Air Pacific Limited and Orangestar, but it would also have to cease operation of its wholly-owned New Zealand incorporated subsidiary, Jetconnect Limited, and a number of other operations in which it has an interest:

> If enacted, the bill would require Qantas to cease this operation.
>
> In addition, Qantas has a 46.3 per cent interest in Air Pacific Ltd, Fiji's national carrier, and a 45 per cent shareholding in Orangestar, a Singapore company with two low-cost subsidiary airlines, Jetstar Asia and Valuair, which may be associates. If these companies are associates of Qantas, the

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26 Section 50AAA of the Corporations Act describes a number of criteria under which an entity is considered to be an associated entity of another entity, including that the principal entity has a qualifying investment in the other entity and has significant influence over the associate.

27 APA, *Submission 2*, p. 2.

28 APA, *Submission 2*, p. 2.

29 APA, *Submission 2*, p. 3.

30 *Proof Committee Hansard*, 13 March 2007, p. 11 [Mr Coe].

31 Qantas Airways Limited, *Submission 6*.

> current drafting would force Qantas to dispose of these shareholdings. Qantas is sure that this is not the intent of the legislation.[32]

3.33 Representatives of the Department of Transport and Regional Services also commented on the use of the words 'associated entities' and the range of companies that could be affected:

> Firstly, our view is that by using the words 'associated entities' it probably captures entities not intended by the bill. We have some concerns about the use of the wording 'associated entities' because potentially, as it is drawn from the Corporations Act, it encompasses much more than wholly-owned subsidiaries of Qantas; it potentially captures entities which Qantas has an investment in but which it may not control…From our perspective, I do not envisage it would be the parliament's view that it would be seeking to limit Qantas's ability to invest in Australia and offshore. Australian companies are investing offshore to the benefit of the country. So I think the issue of 'associated entities' is unclear.[33]

3.34 The Australian Council of Trade Unions (ACTU) however supports the approach in the bill, submitting that: 'It is proper that the provisions of the Qantas Sale Act cover the Qantas Group and all entities under the control of the Qantas Group'.[34]

Location of offices and facilities

3.35 Another aim of the bill, as articulated in its long title, is to ensure Qantas group jobs and operations stay in Australia. The proponent of the bill, Senator Steve Fielding, also made it clear that this was his intention in his second reading speech:

> Family First believes it is a huge 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. Securing Australian jobs for workers and their families is Family First's top priority. That is why Family First is introducing legislation today to protect Jetstar from foreign ownership and help stop jobs and operations from going offshore.[35]

3.36 A range of organisations, including the Australian and International Pilots' Association (AIPA), the Australian Licenced Aircraft Engineers' Association (ALAEA) and the several unions that made submissions, shared concerns that the Qantas Sale Act in its current form would allow whoever controlled Qantas to establish a new entity and subsequently shift to it resources, licences and other rights, leading to a loss of Australian jobs amongst pilots, people who maintain aircraft and among a wide range of others who provide services to the airline industry such as catering.

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32 *Proof Committee Hansard*, 13 March 2007, p. 3. [Mr Johnson]

33 *Proof Committee Hansard*, 13 March 2007, p. 51.

34 ACTU, *Submission 1*, paragraph 6.

35 *Senate Hansard*, 27 February 2007.

3.37 Supporting the objectives of the bill, individual submitters also raised a number of particular concerns about the implications of allowing jobs to go offshore. For example, the Australian and International Pilots' Association told the committee that:

> From our perspective, there certainly is the issue of maintaining employment and maintaining jobs relevantly in Australia. We also see that there is an issue in historical terms. The Australian public and the Australian government have contributed very strongly to Qantas.[36]

3.38 The committee noted that there has been considerable employment growth in Australia within Qantas over recent years:

> For the Qantas group as a whole, in the period since September 11, 2001, and at a time when many airlines in the industry stabilised or went backwards, Qantas grew employment by several thousand. As part of that growth, since May 2004 Jetstar itself has added about 1,600 people—initially, 1,000 or so with the domestic operations, and then the rollout to international has added about 550. The group strategy that has been pursued has resulted in considerable investment and growth in employment of several thousand people.[37]

3.39 While acknowledging that Qantas 'is the safest airline in the world', the Australian Licenced Aircraft Engineers' Association (ALAEA), explained its support for the bill's objectives in these terms:

> The importance to safety of having maintenance carried out in Australia is my prime concern for being here today. Secondary to that would be the employment and livelihoods of our members.[38]

3.40 The ALAEA representative made a number of allegations (some of which were refuted by Qantas in a document tabled at the public hearing) about substandard maintenance work practices allegedly observed in some overseas maintenance facilities and the adequacy of training of persons conducting maintenance operations in overseas facilities. The committee has not had any opportunity to test the veracity of these claims, and observes that at the time of writing, Qantas has not had any opportunity to respond in detail to the ALAEA evidence. On this basis, the committee is not able to give them any credence as an argument for supporting the bill.

3.41 Other contributors to the inquiry raised a variety of other possible consequences of allowing maintenance jobs in particular to go offshore. For example, the ACTU submission expressed concern about the possibility of Qantas' strategic defence services being moved overseas.[39] Similarly, the Australian Workers' Union

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36 *Proof Committee Hansard*, 13 March 2007, p. 21. [Mr Somerville]

37 *Proof Committee Hansard*, 13 October 2006, p. 3. [Mr Hawes]

38 *Proof Committee Hansard*, 13 March 2007, p. 28. [Mr Purvinas]

39 ACTU, *Submission 1*, paragraph 13.

(AWU), in its submission, was particularly concerned about the future of maintenance apprenticeships and their impact on Australia's defence capability.[40] It notes the skill shortages apparent in engineering and licensed aircraft engineering mechanic trades and states that these shortages have the potential to fundamentally undermine the nation's defence capabilities at a time when the country is increasingly engaging in international theatres of operation. Further, its submission highlights the role of Qantas Defence Services which provides maintenance, repair and overhaul of military aircraft, engines and avionics. The Australian Manufacturing Workers' Union (AMWU) also focussed on the importance of Qantas apprenticeships.

3.42 Qantas was dismissive of concerns that Qantas and Jetstar would be sold to overseas interests and facilities transferred overseas:

> The vast bulk of Jetstar's employees and the facilities used to support its operations are based and will continue to be based in Australia. Against this background, the concerns expressed by Senator Fielding in his second reading debate speech about Jetstar being sold off to overseas buyers are unfounded. They run counter to the Qantas group's strategy of retaining and growing the complementary Qantas and Jetstar businesses.[41]

3.43 In relation to heavy maintenance outsourced overseas, Qantas representatives noted that all but 10 per cent of heavy maintenance checks are conducted in Australia:

> Typically, in excess of 110 heavy maintenance checks are done per year and around 10 per cent would be done offshore. As Brett indicated, that has been happening for a number of years. If you were to build a facility footprint capable of handling the peaks and troughs and the overflow, you would find that there would be underutilised capacity for a large part of the year. It is a more efficient way to handle the peaks by making some use of offshore maintenance.[42]

3.44 Qantas also tabled a document at the public hearing in which it outlined its ongoing commitment to investment in maintenance and engineering facilities in Australia. In this document, Qantas stated the following:

> The Qantas Group operates one of the largest aircraft engineering and maintenance organisations in the Asia Pacific region; and
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> - employs more than 6,000 people in maintenance facilities in Australia
> - is one of the few airlines in the world with its own industry training program

40 AWU, *Submission 8*, p. 5.

41 *Proof Committee Hansard*, 13 March 2007, p. 2. [Mr Johnson]

42 *Proof Committee Hansard*, 13 March 2007, pp 9–10. [Mr Hawes]

- continues to invest in engineering and maintenance training – in January 2007, there were about 400 apprentices employed under the airline's certified trade program
- has invested $300 million in facilities and training over the last 5 years through:
    - in August 2005 commenced investment of more than $10 million to establish a Centre of Excellence for the maintenance of Rolls Royce RB211 engines in Sydney
    - in 2005 completed a new $85 million maintenance hangar in Brisbane
    - continues to support Australia's defence needs. In February 2007 Qantas Defence Services signed a contract with the RAAF to provide support services for their fleet of A330 Multi Role Tanker aircraft.[43]

3.45 In its submission, Qantas told the committee that in recent months it had opened a new $29 million A320 maintenance facility in Newcastle. Qantas described this as 'an investment that will create additional skilled jobs and apprenticeship opportunities'.[44]

3.46 APA states in its submission that its Deed of Undertaking provides that Australia will remain the principal operational centre for the scheduled international air transport services provided in aggregate by the Qantas Group (which includes Qantas and Jetstar).[45]

3.47 When questioned about the importance of job security as an issue, Mr Coe of APA responded that the way to ensure job security is through growth of the airline:

> The way to ensure job security is through growth of the airline. Geoff and his management team have stated that. At the APA level we have stated that. No business has ever been shrunk to greatness, and it is not the intention of the APA consortium to do anything other than grow both the product offering and the availability of jobs for Qantas and Jetstar.[46]

Shortcomings in the drafting of the bill

3.48 While supporting the general objectives of the bill in relation to ensuring that Qantas jobs remained in Australia, the AIPA and the ALAEA cast doubt on whether the bill as worded would achieve that objective. In particular, these organisations identified the phrase 'taken in aggregate' in proposed paragraph 9(5)(b) as the source of these problems.

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43 Qantas supplementary submission, p. 3.

44 Qantas, *Submission 6*.

45 APA, *Submission 2,* p. 2.

46 *Proof Committee Hansard,* 13 March 2007, p. 14.

3.49 The AIPA said that the wording of proposed paragraph 9(5)(b) would permit 'substantial off-shore leakage of jobs in associated entities and suppliers of their facilities'. AIPA submitted that the wording compares Australian operations and those in any one particular country, which:

> …would permit, for example, 25% of the facilities to remain in Australia and 75% to go off-shore, spread between 5 countries with 15% in each country, so that the principal operational centre for any associated entity would remain located in Australia as required.[47]

3.50 The AIPA recommended that proposed paragraph 9(5)(b) be amended to:

> …ensure that the Australian facilities, when compared to facilities in all other countries, represent the principal operational centre for the associated entities of Qantas.[48]

3.51 The ALAEA raised a similar concern about the words 'taken in aggregate':

> To maintain the intention of this bill, to ensure that jobs and operations stay in Australia, we would feel it appropriate to change a few words in 2(5)(b). Instead of saying 'the facilities taken in aggregate which are used', we would prefer the bill to state 'each of the facilities which are used by Qantas'. That way the facilities can be taken as a single unit and ensure that only 50 per cent of any particular facility can be sent overseas. This would cater for Qantas's current requirement to send overflow work to other maintenance facilities around the world.[49]

Foreign ownership issues

3.52 One of the bill's objectives is to protect Jetstar from foreign ownership. Implicit in its provisions is an assumption that there are not currently sufficient safeguards to prevent Jetstar from being sold to non-Australian interests. However Qantas and APA consider that the foreign ownership of Jetstar is adequately restricted under existing Commonwealth legislation and policy, and that further legislative restrictions are unnecessary and would in fact place an unfair burden on Jetstar in comparison to its competitors.

3.53 The bill is intended to ensure that the foreign ownership restrictions in the Qantas Sale Act would apply to Jetstar. These are more stringent than those applying from other sources, as detailed by Mr Mrdak of DOTARS:[50]

> There are additional provisions in the Qantas Sale Act that apply to foreign ownership that do not apply to other Australian international carriers. For

47 AIPA, *Submission 10*, p. 6.

48 AIPA, *Submission 10*, p. 6. Note that AIPA also recommended that the equivalent provision in the Qantas Sales Act (paragraph 7(1)(h)) be amended in the same way.

49 *Proof Committee Hansard*, 13 March 2007, p. 28. [Mr Purvinas]

50 *Proof Committee Hansard*, 13 March 2007, p. 48.

> instance, under the Qantas Sale Act there is a requirement that foreign airlines can own no more than 35 per cent of shares in Qantas and that no one individual foreign entity can hold more than 25 per cent of shares in Qantas. Those provisions do not exist in relation to other Australian international carriers.

3.54 However, as Australian international airlines, both Jetstar and Qantas are subject to the *Air Navigation Act 1920*. The foreign ownership limitation in section 11A of the Air Navigation Act imposes a 49 per cent restriction on foreign ownership.

3.55 Other restrictions on foreign ownership also exist. As nationally-designated carriers, Qantas and Jetstar benefit from bilateral air service agreements which give them access to certain international routes. This access is dependent on ownership restrictions which require that the international carrier must be substantially owned and effectively controlled by nationals of the designating country. Mr Mrdak told the committee that:

> The Air Navigation Act covers all of the licensing and designation requirements for all Australian international carriers…we do set requirements in relation to Australian carriers that not only must foreign shareholdings be no more than 49 per cent but at least two-thirds of the board members must be Australian citizens, the chairperson of the company must be an Australian citizen, the airline's head office must be in Australia and the airlines operational base must be in Australia. They are requirements the government sets in issuing an international airline licence and also in designating an airline capable of operating under Australia's designated bilateral agreements. Those provisions apply to all carriers applying for an international airline licence, apart from Qantas, which has provisions on top of that under the Qantas Sale Act in relation to its operations.[51]

3.56 APA also cites the Government's foreign investment policy and powers under the *Foreign Acquisitions and Takeovers Act 1975* as providing sufficient protection from foreign ownership of Jetstar. Accordingly, APA submits that the foreign ownership of Jetstar is adequately restricted under existing Commonwealth legislation and policy, and that further legislative restrictions in this regard are therefore unnecessary.[52]

3.57 Similarly, Qantas states that fears of Jetstar being sold to overseas buyers are unfounded and run counter to the Qantas Group's strategy of retaining and growing the complementary Qantas and Jetstar businesses.[53]

3.58 Qantas submits that no additional requirements are imposed on the other Australian designated international carrier, Virgin Blue, or are likely to be imposed on

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51 *Proof Committee Hansard*, 13 March 2007, p. 48.

52 APA, *Submission 2*, p. 2.

53 Qantas Airways Limited, *Submission 6*.

any new entrant who may become an Australian designated international carrier. Therefore, it is not appropriate to impose on Jetstar (and Qantas' other associated entities) conditions which are not imposed on its competitors and were, at the enactment of the Qantas Sale Act, only intended to apply to Qantas.[54] Mr Swan from the Australian Workers Union suggested that it is appropriate for additional conditions to apply to Jetstar on the basis that Virgin Blue does not have the reach or significance of the Qantas Group, nor does it provide the services or have the historical background and cultural identity of Qantas.[55]

Other drafting issues

3.59 Proposed subsection 9(6) in the bill prevents any scheme to avoid the provisions of the Qantas Sale Act from having effect. In its submission, APA states that the subsection 'appears to be closely based on section 38A of [the *Foreign Acquisitions and Takeovers Act 1975*]' but it proposes a different threshold for the application of the provision.[56] APA submits that the term 'material purpose' in the subsection is imprecise. Further, it asserts that the provisions in the Qantas Sale Act are of sufficient clarity to render an anti-avoidance provision of the type proposed in the bill unnecessary.

Conclusions and recommendation

3.60 The committee notes that while there was discussion as to whether Qantas and Jetstar would become foreign owned and controlled if the consortium bid was successful it is clear that while Qantas and Jetstar remain airlines operating Australian international services they must remain Australian owned and controlled in accordance with legislative and regulatory requirements.

3.61 The committee is of the view that this bill contains a number of serious shortcomings. In particular, the scope of the bill is unclear, and if passed in its current form, it is likely to result in a number of unintended and unforseen consequences. The bill also seeks to provide protections that are already in operation by virtue of the Air Navigation Act and the bilateral air service agreements.

3.62 The committee is also of the view that the Deed of Undertaking entered into between the Government and Airline Partners of Australia renders the bill unnecessary.

3.63 The committee also questions the appropriateness of seeking to impose by force of legislation a number of significant restrictions on the operations of what is now a private company. These restrictions, if passed, would apply to Qantas and its subsidiaries only, and not to its competitors, potentially threatening its future viability

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54 Qantas Airways Limited, *Submission 6*.

55 *Proof Committee Hansard*, 13 March 2007, pp 43–44.

56 APA, *Submission 2*, p. 3.

and its ability to compete in a vigorously contested market. As such, the bill may perversely bring about that which it seeks to prevent, the loss of Australian jobs.

Recommendation

3.64 **The committee recommends that the Senate reject the bill.**

Senator the Hon Michael Ronaldson
Chair