

AIRLINE PARTNERS AUSTRALIA LIMITED

Submission to the Senate Economics Committee Inquiry into the Qantas Sale (Keep Jetstar Australian) Amendment Bill 2007

1 Introduction

- 1.1 Airline Partners Australia Limited (“**APA**”) welcomes the opportunity to respond to the Senate Economics Committee’s invitation to provide written submissions in respect to the Inquiry into the *Qantas Sale (Keep Jetstar Australia) Amendment Bill 2007* (“**Bill**”).
- 1.2 APA has commenced a takeover bid for all of the issued shares of Qantas Airways Limited (“**Qantas**”). Qantas is subject to the *Qantas Sale Act 1992* (“**QSA**”), the legislation sought to be amended by the Bill. The QSA requires Qantas to be majority Australian owned and restricts aggregate foreign ownership to 49%.
- 1.3 APA does not currently own any shares in Qantas, and its bid is currently in the hands of Qantas’ shareholders. As a result, APA does not currently control Qantas. If APA’s bid is successful, APA will comply fully with the requirements of the QSA and other applicable laws.
- 1.4 APA is not a foreign person and its acquisition of Qantas, if successful, will result in an increase in the Australian equity ownership of Qantas.¹

2 The protections proposed by the Bill already exist

- 2.1 The Bill states that its purpose is to protect Jetstar from foreign ownership and ensure jobs and operations stay in Australia, and for related purposes. The following protections already exist which achieve the specific purposes of the Bill:

Foreign ownership

- **Air Navigation Act** - the *Air Navigation Act 1920* (“**Air Navigation Act**”) places a 49% restriction on foreign ownership of any “Australian international airline” (effectively an airline other than Qantas, that is designated by the Australian Government to operate a scheduled international air service under a bilateral agreement with another country). The drafting of this limitation is practically identical to the 49% foreign ownership limitation that applies to Qantas under the QSA.

Jetstar is an Australian international airline subject to the Air Navigation Act, and the foreign ownership restriction in that Act clearly applies. The foreign ownership of Jetstar is therefore already limited in aggregate in the same way as Qantas’ foreign ownership is limited.

¹ Reflects the voting interest of the foreign investors in the APA Fund. Consistent with the QSA, the total economic interest of the foreign investors in APA will be 49%.

- **Foreign Investment Policy** - the Federal Government’s foreign investment policy states that “foreign persons (including foreign airlines) can generally expect approval to acquire up to 49% of the equity in an Australian international carrier (other than Qantas) individually or in aggregate provided the proposal is not contrary to the national interest”. This echoes the foreign ownership restrictions prescribed by the Air Navigation Act. Further, where foreign persons individually propose to acquire 15% or more, or in aggregate 40% or more, of a Australian company, the Federal Treasurer has power under the *Foreign Acquisitions and Takeovers Act 1975* (“**FATA**”) to make orders in respect to the proposal consistent with and to protect Australia’s national interest.

2.2 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.

Jobs and operations

2.3 As described above, one of the main objectives of the Bill is to ensure jobs and operations stay in Australia. APA has provided an enforceable undertaking to the Treasurer of the Commonwealth of Australia and the Minister for Transport and Regional Services providing 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). This enforceable undertaking is in substantially the same terms as the proposed amendment to the QSA contained in the Bill, and will therefore have the effect of protecting the Australian jobs associated with those principal operations. APA therefore submits that additional legislation is not required to achieve the protection of Australian jobs and operations intended by the Bill.

3 If the Bill proceeds, amendments need to be made

3.1 The primary submission of APA is that the Bill is unnecessary. However, APA submits that should the Bill proceed it needs to be amended, as it is unworkable in its current form. APA makes the following submissions in respect to the provisions of the Bill.

“Associated Entity” Test Too Wide

3.2 Rather than specifically referring to Jetstar, the Bill proposes to extend certain QSA provisions to Qantas’ “associated entities” (a term defined in the *Corporations Act 2001* (“**Corporations Act**”). The Corporations Act definition of “associated entity” is extremely wide and goes much further than that required to meet the stated purposes of the Bill.

3.3 Given the breadth of the definition of “associated entity”², the restrictions in the Bill could apply to many Qantas associated entities to whom application of the restriction would be inappropriate and unintended (eg. 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).

² See particularly section 50AAA(5) of the Corporations Act, which effectively makes an entity (first entity) an “associated entity” of another entity (second entity) if the first entity has an investment in the second entity that is material to the first entity, and the first entity has significant influence over the second entity.

- 3.4 As a result of the above, 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. This would restrict Qantas' growth, including employment growth opportunities.
- 3.5 On the basis of the above, APA submits that references in the Bill to "*associated entity*" should be removed and replaced with "*Jetstar Airways Limited*" or, at the very least, "*each wholly owned subsidiary of Qantas that conducts international air services under a bilateral agreement*".

Anti-avoidance Provision

- 3.6 The Bill proposes to add an anti-avoidance provision, which appears to be closely based on section 38A of FATA. Section 38A only applies where a "scheme" is carried out for the "sole or dominant purpose" of avoiding the application of the FATA. However, the Bill proposes a different threshold for the application of the proposed provision so that it would apply if the scheme has a "material purpose" of avoiding the provisions of the Bill. APA submits that the term "material purpose" is imprecise.
- 3.7 APA submits that the provisions of the QSA are of sufficient clarity to render an anti-avoidance provision of the type proposed in the Bill unnecessary. APA clearly understands its obligations under the QSA in the event that its takeover offer is successful and intends to fully comply with those obligations.
- 3.8 In any event, one of the main objectives of the Bill is to limit foreign ownership of Jetstar. As set out above, such limits apply already under the Air Navigation Act and foreign investment policy applied under FATA. The FATA already applies to foreign persons and APA submits that a further anti-avoidance provision in respect to foreign persons is unnecessary.

Other Drafting Comments

- 3.9 The new subsection (5) to section 9 of the QSA proposed by the Bill extends certain of the restrictions set out in section 7(1) of the QSA to Qantas and its "associated entities". APA submits that there is no need to replicate the restrictions contained in subsections (a), (c) and (d) of the proposed section 9(5) to Qantas, given that they are already applied to Qantas in section 7(1) of the QSA. These subsections should apply only to Jetstar or, at the very least, each wholly owned subsidiary of Qantas that conducts international air services under a bilateral agreement. The inclusion of the reference to Qantas in proposed subsection 9(5)(b) is however appropriate (subject to the amendments suggested in paragraph 3.5) to ensure that the scheduled international air transport services provided by the Qantas Group are viewed in aggregate.

4 Conclusion

- 4.1 APA respectfully submits that the Bill is unnecessary to achieve its stated objectives. Current legislation, policy and enforceable undertakings are already in place which provide the protection that the Bill seeks.
- 4.2 APA repeats its public position that Qantas will remain majority Australian owned and controlled should it succeed in its takeover proposal.

Bob Mansfield
Director
Airline Partners Australia Limited
ACN 123 058 917
Level 60
Governor Phillip Tower
1 Farrer Place
SYDNEY NSW 2000