



Australian Government

Qantas Sale Amendment Act 2014

Post-Implementation Review

October 2017

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Introduction

This review has been conducted in line with the Australian Government's best practice regulation framework. It answers the key questions to be considered in a post implementation review, based on evidence gathered through ongoing consultation and monitoring conducted since implementation.

This review is limited to the amendments contained within the *Qantas Sale Amendment Act 2014* (Amendment Act), being the removal of Qantas' 35 per cent and 25 per cent foreign ownership restrictions. It considers the implementation of these changes and evaluates whether they were of overall benefit.

In line with the best practice regulation framework this review aims to answer the following key questions:

- 1) What problem was the regulation meant to solve?
- 2) Why was Government action needed?
- 3) What policy options were considered?
- 4) What were the impacts of the regulation?
- 5) Which stakeholders have been consulted?
- 6) Has the regulation delivered net benefit?
- 7) How was the regulation implemented and evaluated?

What problem was the regulation meant to solve?

The Amendment Act repealed paragraphs of the *Qantas Sale Act 1992* containing certain restrictions on the ownership of shares in Qantas. In particular, the amendments removed the requirement for Qantas' articles of association to prevent foreign airlines having more than 35 per cent, and any one foreign person having more than 25 per cent, of the total value of Qantas shares. The amendments to the *Qantas Sale Act 1992* took effect on 25 August 2014.

The changes introduced by the Amendment Act proceeded a turbulent period in the Australian aviation industry, characterised by difficult market conditions and fierce competition within the Australian domestic market. These factors significantly impacted Qantas' profitability and led to calls for government intervention. In particular, there were calls to 'even the playing field' for Qantas by removing foreign investment restrictions placed on Qantas in the *Qantas Sale Act 1992* that did not apply to its competitors.

By removing restrictions on foreign investment, Qantas would gain increased access to overseas capital markets and lower its cost of capital, improving its competitiveness against key rivals.

Why was Government action needed?

At the time, Qantas accounted for approximately 62 per cent of the Australian domestic aviation market, and contributes approximately \$11.4 billion to the Australian economy.^{1,2} Ensuring the ongoing viability and competitiveness of Qantas was important for the aviation sector and for the broader Australian economy. As a result, measured Government intervention to ensure Qantas' continued competitiveness was justified.

What policy options were considered?

A range of policy options were considered prior to drafting the Amendment Act, as outlined below.

Option 1 – Remove foreign ownership and other legislative restrictions

This option proposed repealing Part 3 of the Qantas Sale Act in its entirety, which would remove the 35 and 25 per cent foreign ownership restrictions as well as other legislative restrictions that do not apply to its competitors.

These additional legislative restrictions are:

- i. Qantas cannot change its company name to a name that does not include the expression 'Qantas';
- ii. Qantas is prevented from 'conducting' scheduled international air transport passenger services under a name other than its company name; or a registered business name that includes the expression 'Qantas';
- iii. Foreign shareholders are excluded from votes on the removal and appointment of directors in some circumstances; and
- iv. Subsection 7(1)(h) of the QSA states that '... of the facilities, taken in aggregate, which are used by Qantas in the provision of scheduled international air transport services (for example, facilities for the maintenance and housing of aircraft, catering, flight operations, training and administration), the facilities located in Australia, when compared with those located in any other country, must represent the principal operational centre for Qantas.'

The option of removing these additional legislative restrictions was considered in the broader regulatory context for international aviation.

All other Australian international airlines are subject to the *Air Navigation Act 1920* (the 'ANA'). The ANA effectively limits total foreign ownership to 49 per cent, and does not impose the additional restrictions on business operations that apply to Qantas.

¹ CAPA Centre for aviation, 17 Apr 2015, *Australia domestic airline market outlook: Qantas Group reins in capacity as Virgin continues growth*, <centreforaviation.com>.

² Deloitte Access Economics, The Qantas Group, November 2015, the Economic Contribution of the Qantas Group to Australia, pp.4

However, foreign investment in international airlines is not only limited by statute. International air services agreements also impose ownership and control restrictions to ensure only airlines belonging to the countries party to the agreement can access the traffic rights granted under the agreement. International airlines wishing to access Australia's negotiated air traffic rights must be 'designated' by the Government, and designation criteria are applied to ensure the airline meets the relevant ownership and control requirements under the agreement.

Under the designation criteria, Australian airlines seeking designation are required to demonstrate that:

- i. they are substantially owned and effectively controlled by Australian nationals;
- ii. at least two-thirds of the Board members must be Australian citizens;
- iii. the Chairperson of the Board must be an Australian citizen;
- iv. the airline's head office must be in Australia;
- v. the airline's operational base must be in Australia; and
- vi. no more than 49 per cent of the total value of the issued share capital can be held by foreign persons.

In practice, these criteria mean that Australian international airlines have a commercial interest in maintaining majority Australian ownership in order to protect their access to traffic rights.

These designation criteria would limit the practical impact of any changes to the operational restrictions contained in the *Qantas Sale Act 1992*.

Option 2 – Take no action

This option would have involved taking no action, maintaining the status quo. Qantas would continue to have its business regulated by the *Qantas Sale Act 1992* and all other Australian international airlines would remain subject to the 49 per cent rule of the *Air Navigation Act 1920*.

Option 3 – Only remove the foreign ownership restrictions.

This option involved the removal of the foreign ownership sublimits in Part 3 of the *Qantas Sale Act*. These restrictions required aggregate ownership by foreign airlines to be limited to 35 per cent and ownership by a foreign individual to 25 per cent. The additional restrictions on Qantas' operations (including around use of the name Qantas and ensuring that its principal base is in Australia) would continue to apply.

Qantas would be subject to an overall 49 per cent foreign ownership restriction, consistent with all other Australian international airlines.

This is the option implemented through the Amendment Act.

What were the impacts of the regulation?

It is not possible to definitively determine the impacts of the Amendment Act, as it came into effect at a time when Qantas implemented a range of measures to improve their performance. These measures have led Qantas to achieve a significant recovery since the Amendment Act was implemented, recording an underlying profit before tax of \$927m in 2014/15.

Shortly after the Amendment Act commenced, Qantas implemented amendments to their articles of association to remove the restrictions previously imposed by the *Qantas Sale Act 1992*.

While the impacts of the Amendment Act cannot be separated from other factors, it is clear the changes form an important component of their long term strategy, as cited in the 2014 Annual Report:

“Following a wide-ranging review of the structure of the Qantas Group, the Board has given approval for the establishment of a new holding structure and corporate entity for Qantas International.

This step – following the partial repeal of the Qantas Sale Act – creates the long-term option for Qantas International to source external investment and participate in partnership opportunities in the global aviation market.”

Qantas Annual Report, 2014

Measuring the Regulatory Burden

As part of this review the impact of the Amendment Act has been evaluated consistent with the Regulatory Burden Measurement Framework. This includes consideration of compliance and delay costs associated with the change.

The Amendment Act directly affected one stakeholder – Qantas. Impacts on other stakeholders are limited to the effect of Qantas’ increased competitiveness, which is outside of the scope of the Regulatory Burden Measure.³

The administrative costs of changing Qantas’ articles of association have been evaluated as being zero. It should be noted the Amendment Act does not require any action to be taken by Qantas; the Amendment Act provided Qantas with the option to amend their articles of association, which they chose to do.

The Amendment Act does not alter Qantas’ ongoing compliance costs. The Qantas Sale Act 1992 effectively required Qantas to maintain a share register to ensure it did not exceed its foreign ownership restrictions. However, removal of these foreign ownership restrictions did not alter the requirement to maintain a share register. The remaining foreign ownership cap, as well as Australian Stock Exchange listing rules also require a share register to be maintained. In effect, the Amendment Act merely changed the levels of shareholdings permitted within the register.

The Amendment Act did not require, nor result in, any substantive compliance cost (such as the purchase of plant or equipment).

The Amendment Act did not result in any delay costs, as administrative application and approval processes were unaffected.

The following table demonstrates that the Amendment Act has not resulted in any identifiable compliance cost.

³ Office of Best Practice Regulation, July 2014, Guidance Note: Regulatory Burden Measurement Framework.

Regulatory Burden and Cost Offset (RBCO) Estimate Table

Average Annual Compliance Costs				
Costs (\$m)	Business	Community Organisations	Individuals	Total Cost
Total by Sector	\$0	\$0	\$0	\$0
Cost offset (\$m)	Business	Community Organisations	Individuals	Total by Source
Agency	\$0	\$0	\$0	\$0
Within portfolio	\$0	\$0	\$0	\$0
Outside portfolio	\$0	\$0	\$0	\$0
Total by Sector	\$0	\$0	\$0	\$0
Proposal is cost neutral?	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> no		
Proposal is deregulatory	<input checked="" type="checkbox"/> yes	<input type="checkbox"/> no		
Balance of cost offsets	\$0			

Which stakeholders have been consulted?

As part of the policy development process, the Department of Infrastructure and Regional Development (the Department) received representations from a range of stakeholders including both Qantas and their key competitor in the Australian market, Virgin Australia, which supported the amendments.

The Department regularly engages with key aviation stakeholders, including Qantas, through direct engagement and a range of industry forums. Qantas have previously indicated they would like to see further restrictions removed (such as is outlined in Option 1) but have not expressed concerns with the amendments made through the Amendment Act. Qantas' key competitors have not expressed any concerns with the amendments following implementation.

Has the regulation delivered net benefit?

The additional flexibility provided to Qantas has clearly delivered a net benefit. This flexibility has been identified by Qantas as an element of their long-term strategy, which in the short term has successfully returned Qantas to profitability. However, separating the impact of the amendments from the other factors driving Qantas' results is not possible.

How was the regulation implemented and evaluated?

The Amendment Act was implemented consistent with the standard legislative development process. Following passage of the legislation, Qantas developed a revised constitution which was supported by over two thirds of shareholders. From there no further administration or compliance was required, with existing mechanisms to monitor the Qantas business to ensure compliance with the *Qantas Sale Act 1992* continuing to operate unaffected.

The Department continues to monitor the competitive environment of the aviation industry and will respond to emerging trends as needed.