AUSTRALIAN COMPETITION LAW
UPDATE FOR THE AVIATION INDUSTRY

Airlines operating in Australia currently face an unprecedented degree of legal and regulatory change. This shifting landscape presents both opportunities and risks. DLA Piper has significant experience in the aviation sector and can assist in any area of competition law, from reviewing agency agreements and advertisements to advising on online booking systems and dealings with competitors.

Harper review creates opportunity for structural changes in Australia

The Final Harper Review has created opportunities for structural change in the aviation sector by recommending reform in relation to the supply of jet fuel and the cost of air traffic control services. It also recommends significant changes to the anti-competitive provisions of the *Competition and Consumer Act*. The Australian Government will consider the recommendations over the next few weeks before issuing a response in May 2015. Read More

Consultations continue regarding second Sydney International Airport

The Australian Government continues to consult with Sydney Airport Group regarding the development and operation of Sydney's second international airport at Badgery's Creek. Consultation is expected to conclude in June 2015. Read More

Australian Competition and Consumer Commission (ACCC) proposes to deny Qantas/China Eastern co-ordination

After approving multiple co-ordination agreements between various airlines in recent years, the ACCC has announced that it plans to deny authorisation for the proposed co-ordination agreement between Qantas and China Eastern on the basis of a lessening of competition on the Sydney-Shanghai route. Read More

Qantas penalised for selling banned products

Qantas has been fined $200,000 for selling banned products known as Nanodots through its duty free program. The Federal Court stated that outsourcing the identification and supply of products for its duty free program to Alpha Flight Services, did not relieve Qantas of the obligation to ensure that its duty free program complied with the law. Read More

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HARPER REVIEW CREATES OPPORTUNITY FOR STRUCTURAL CHANGES IN AUSTRALIA

The Final Harper Competition Policy Review Report (Harper Review) released on Tuesday 31 March 2015 creates real opportunities for legislative change that could benefit airline operators.

Specifically, it creates an opportunity for structural change in the aviation industry by recommending reform in relation to the supply of jet fuel and the cost of air traffic control services. The Australian Government is expected to respond to the recommendations by the end of May 2015. Prior to that time, businesses have a further opportunity to put forward any views. Further detail is below:

- **Jet fuel supply**: The Harper Review recommends reform to facilitate greater competition in jet fuel supply at Australian airports. This could reduce the jet fuel differential in Australia, which BARA observes is among the highest globally. The Harper Review leaves the details of reform to be determined. Reform could involve deemed declaration of infrastructure to ensure that potential jet fuel suppliers can obtain access to the jet fuel infrastructure supply chain on commercial terms.
- **Cost of air traffic control services**: The Harper Review recommends reform to the pricing structure for services provided by Airservices Australia but leaves the details of reform to be determined. If accepted, this could result in a reduction in the prices imposed for air traffic control services at major capital city airports and an increase in the corresponding prices at regional airports.
- **Protections against use of power**: The Harper Review recommends bringing the misuse of market power prohibition into line with the other provisions in Part IV of the CCA. If implemented, these amendments would make it significantly easier to prove a contravention of section 46, primarily because of the addition of an 'effects' test and the removal of the 'take advantage' limb.

  The ACCC has long advocated for the addition of an effects test on the basis that it is difficult for it to prove the subjective purpose of an accused.

  The taking advantage limb has traditionally provided comfort to firms engaging in conduct that would be a rational business strategy even for a firm without substantial market power. The removal of this limb would expand the reach of the prohibition and place significant importance on the interpretation of the substantial lessening of competition test, which the Harper Review recommends inserting in place of the existing proscribed anti-competitive purposes.

  In addition, the Harper Review endorses the continued application of the unconscionable conduct prohibition to B2B dealings. The recent decision of the Federal Court penalising Coles $10m for misusing its bargaining power with suppliers is a significant development in the law of unconscionable conduct which is likely to result in more extensive use of this prohibition.
- **Streamlined authorisation process**: The Harper Review recommends streamlining the authorisation process and expanding the circumstances in which the ACCC may grant authorisation to include circumstances where the proposed conduct does not substantially lessen competition. If implemented, both of these changes would make it easier to obtain authorisation in respect of co-ordination agreements between carriers.
- **Clarification regarding cartel conduct**: The Harper Review recommends simplifying and restricting the operation of the cartel laws. Specifically, the recommendations include:
  - Expressly requiring a nexus with Australia by limiting the operation of the cartel laws to cartel conduct involving persons who compete to supply products to or acquire products from persons resident in or carrying on business within Australia. If implemented, this would address the fact that the current cartel laws do not contain any express jurisdictional limitation. In this respect the current cartel laws differ from the provisions relevant to the recent judgment in *ACCC v Air New Zealand* where the Federal Court found that conduct did not breach Australian competition law because it did not occur in a 'market in Australia.
  - Limiting the circumstances in which firms will be deemed competitors such that the cartel laws apply. If implemented, this would provide greater certainty regarding the potential field of operation of the cartel laws. That field is currently very wide following the decision of the Federal Court in early 2014 to fine Flight Centre $10m for engaging in price fixing conduct with carriers. In its judgment, the Court concluded that travel agents such as Flight Centre were in competition with carriers. That judgment was appealed by Flight Centre and a decision is expected shortly.

CONSULTATIONS CONTINUE REGARDING SECOND SYDNEY INTERNATIONAL AIRPORT

The Australian Government continues to consult with Sydney Airport Group regarding the development and operation of Sydney's second international airport at Badgery's Creek. Consultation is expected to conclude in June 2015 upon which a contractual phase is likely to commence. The Sydney Airport Group acquired a right of first refusal to develop and operate the new airport in 2002 when it acquired the right to operate the existing Kingsford-Smith Airport. Its experience in operating Kingsford-Smith Airport should stand it in good stead to develop and operate the Badgery's Creek airport. However, the Harper Review observed that although it may have maximised the sale price, granting this right of first refusal may come at the long term cost of a less competitive market structure. The Harper Review further concluded that the existing price monitoring and light handed regulatory approach for airports in Australia appeared to be working well, although if prices continued to increase as fast as they have been, that would raise concerns.

ACCC PROPOSES TO DENY QANTAS/CHINA EASTERN CO-ORDINATION

After approving multiple co-ordination agreements between various airlines in recent years, the ACCC has announced that it plans to deny authorisation for the proposed co-ordination agreement between Qantas and China Eastern.

The ACCC draft decision issued on 24 March 2015 asserts that the proposal would result in significant public detriment in respect of the route between Sydney and Shanghai. Specifically, the ACCC is of the view that:

- Qantas and China Eastern are the only major operators on this route. Combined, they currently operate 83% of the capacity on that direct route (each operates daily flights) and transport 74% of the passengers flown.
- Air China is not likely to offer a sufficient competitive constraint on this route despite the fact that it has a hub in Shanghai, currently operates three services a week on the route (17% of total capacity on the direct route) and could seek to take advantage of recently expanded capacity entitlements on the route;
- Indirect flights on this route do not offer a sufficient constraint to a direct flight. The ACCC's analysis suggests that indirect flights take around 13 hours (cf 10.5 hours direct) and only 12-15% of all travel between Sydney and Shanghai is indirect, despite indirect flights sometimes being significantly cheaper.
- If authorised, the co-ordination agreement would enable Qantas and China Eastern to limit capacity and increase airfares on the Sydney-Shanghai route.
- The public benefits identified would not be sufficient to outweigh the detriment associated with the lessening of competition on the Sydney – Shanghai route.

The ACCC will receive submissions in relation to its draft decision up to 8 April 2015.

QANTAS PENALISED FOR SELLING BANNED PRODUCTS

Qantas has been fined $200,000 for selling banned products known as Nanodots through its duty free program. Nanodots had been banned from sale pursuant to a consumer protection notice due to the health risks posed to children.

The Federal Court stated that outsourcing the identification and supply of products for its duty free program to Alpha Flight Services, did not relieve Qantas of the obligation to ensure that its duty free program complied with the law. This was reflected, at least in part, in the Court's decision to impose a larger penalty on Qantas than it imposed upon Alpha Flight Services. The statement in the duty free catalogue that the products were not for children was not to the point as the products were banned from sale. The Court was also critical of Qantas' systems for dealing with the matter after it was informed that the Nanodots had been banned from sale. The decision in *Director of Consumer Affairs Victoria v Alpha Flight Services Pty Ltd* was handed down in December 2014.