AUSTRALIAN COMPETITION LAW
UPDATE FOR THE AVIATION INDUSTRY

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Competition law is a regulatory risk which airlines operating in Australia need to manage. The legal changes identified below present both opportunities and risks. DLA Piper has significant experience in the aviation industry 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. The below table summarises key competition cases and legislative change in the aviation industry, to see further details, please click 'Read More.'

Jetstar and Virgin Australia found guilty of drip pricing

In November 2015, the Federal Court found that 'drip pricing' on the Jetstar Airways Pty Ltd and Virgin Australia Airlines Pty Ltd mobile booking sites was misleading and deceptive conduct in contravention of Australian law. Specifically, the booking fees associated with a ticket were only disclosed very late in the booking process and were difficult to avoid as they applied to many common forms of payment (including common credit cards). **Read more**

Reduction of regulatory burden in Australia following Harper Review

In November 2015, the Australian Government responded to the Harper Review by accepting recommendations in the Harper Review to simplify cartel laws, alter the extraterritorial application of Australian law, streamline the authorisation process (which is currently used for carrier alliances) and introduce block authorisations. This is likely to slightly reduce the regulatory burden of operating in Australia. **Read more**

ACCC seeks to appeal Flight Centre decision regarding carrier agent discussions

The Australian Competition and Consumer Commission (ACCC) will seek leave to appeal to the High Court in its case against Flight Centre for price fixing. An appeal would seek to overturn the Full Federal Court's decision in July 2015 that Flight Centre had not engaged in attempted price fixing. The Full Court found that even though both Flight Centre and Singapore Airlines (SQ) sold tickets directly to travellers, Flight Centre was not relevantly in competition with SQ for reasons including that it was distributing tickets as agent for SQ. Even if leave to appeal is granted, a judgment in this matter is not likely until around the middle of 2016. **Read more**

ACCC grants authorisation to Qantas China Eastern alliance

The ACCC ultimately granted authorisation to the Qantas China Eastern alliance following submissions advocating that outcome from the Chinese ambassador to Australia and the Australian Department of Infrastructure and Regional Development. The authorisation was subject to conditions. **Read more**

ACCC's decision to extend alliance authorisations

In the last four months, the ACCC issued draft or final determinations to extend the Virgin Delta alliance between Australia and the United States for a further five years, to extend the Virgin Etihad alliance regarding routes between Australia and the Middle East for a further five years and to extend and expand the authorisation received in 2011 under which Qantas and American Airlines (AA) co-ordinate their operations on trans-Pacific routes for a further five years. **Read more**

Plans released for second Sydney International Airport

The Australian Government has released an environmental impact statement and airport plan for the new international airport at Badgerys Creek in Western Sydney. **Read more**

Recommendation to increase capacity rights at major Australian airports

In November 2015, the Productivity Commission recommended that the Australian Government should renegotiate air services agreements to allow unrestricted access to airlines flying to and from Melbourne, Brisbane and Perth airports. **Read more**

JETSTAR AND VIRGIN AUSTRALIA FOUND GUILTY OF DRIP PRICING

In November 2015, the Federal Court found that by advertising ticket prices that excluded a booking fee, and only disclosing the booking fee at a very late stage in the booking process, Jetstar Airways Pty Ltd and Virgin Australia Airlines Pty Ltd had engaged in misleading and deceptive conduct in contravention of Australian law. This was the case even though the booking fees were disclosed prior to payment being made.

The Court considered both the website and mobile booking processes for each carrier and looked at a number of factors including the stage in the booking process at which the booking fees were first disclosed, the ease of ascertaining the booking fees and the familiarity of different customers with the booking process and disclosure of booking fees.

The Court found that the carriers' websites adequately disclosed the booking fees (save for Jetstar's website as at May 2013). Jetstar's website (post September 2013) disclosed the booking fee in various ways including in a pop-up box when a customer selected a particular flight. Virgin's website listed the existence and quantum of the booking fee at the top of the first page at which customers received a specific representation about the cost of a specific flight.

In contrast, the Court found that both carriers' mobile sites resulted in misleading and deceptive conduct because the booking fee was not plainly disclosed, or easily ascertainable, until very late in the booking process. The Court observed that although the Virgin mobile site did contain adequate booking fee information, it was necessary to undertake a series of relatively annoying steps to ascertain its existence and application using links which were not prominently displayed.

REDUCTION OF REGULATORY BURDEN IN AUSTRALIA FOLLOWING HARPER REVIEW

In November 2015, the Australian Government published its response to the Harper Competition Policy Review released in March 2015 (Harper Review). The government accepted a number of recommendations and commence work on drafting the legislative changes to implement those changes, including:

- **Cartel conduct provisions**: The Government will seek to simplify and clarify the cartel laws. The cartel laws currently create significant commercial difficulty because of their broad application and the uncertainty as to who constitutes a potential competitor. For example, in the Flight Centre case discussed, the judge at first instance found that carriers and their travel agents are competitors (such that in theory, the cartel laws could apply to communications between those parties).
- **Extra-territorial reach of law**: The Government will amend the extraterritorial application provisions of the Competition and Consumer Act to remove the requirement for private parties to obtain Ministerial Consent in connection with proceedings involving conduct outside Australia (this consent was a feature of the recent class action in Australia against international carriers in respect of the alleged air cargo cartel), and consider further the nexus required with Australia for international conduct to fall within Australian law.
- **Authorisation**: The Government will seek to streamline authorisation applications. Currently, authorisations are typically required in respect of alliance agreements between carriers.
- **Block exemptions**: The Government will introduce a general class exemption power allowing the ACCC to authorise broad classes of conduct. Although this change is in response to a recommendation regarding the shipping industry, it could have implications for aviation (including in respect of alliances that are currently authorised on a case by case basis).

In respect of the other Harper Review comments and recommendations relevant to aviation, the Government's response:

- **Air cabotage restrictions**: The Government noted the recommendation to remove air cabotage restrictions regarding specific poorly services geographical areas but observed that it does not have any immediate plans to ease aviation cabotage arrangements. However, in respect of Northern Australia, the Government is preparing a White Paper to improve aviation and surface transport which could present opportunities for carriers interested in operating services to that region.
- **Jet fuel supply**: The Government has not formally responded to the suggestion that competition in jet fuel and pricing structure should be a focus for reform. However, the Government has committed to working with states and territories to achieve agreement to a reform agenda including overarching principles to guide competition policy implementation.

ACCC SEEKS TO APPEAL FLIGHT CENTRE DECISION REGARDING CARRIER AGENT DISCUSSIONS

The ACCC will seek leave to appeal to the High Court in its case against Flight Centre for price fixing. An appeal would seek to overturn the Full Federal Court's (Full Court's) decision in July 2015.

The Full Court provided welcome clarification in July 2015 that a carrier and a travel agent are unlikely to be characterised as being in competition with each other for the purposes of the CCA. In upholding an appeal by Flight Centre, the Full Court found that even though both Flight Centre and Singapore Airlines (SQ) sold tickets directly to travellers, Flight Centre was not relevantly in competition with SQ for reasons including that it was distributing tickets as agent for SQ. Our earlier article about this case is available here.

Even if leave to appeal is granted, a judgment in this matter is not likely until around the middle of 2016.

ACCC GRANTS AUTHORISATION TO QANTAS CHINA EASTERN ALLIANCE

In August 2015, the ACCC reversed its draft decision and granted authorisation the Qantas China Eastern alliance for five years. The alliance includes co-ordinating in respect of schedules, frequencies, connection times, new fares and loyalty programs.

In concluding that the public benefit outweighed the public detriment, the ACCC identified a number of public benefits arising from the alliance including:

- Greater prospect of capacity expansion on routes between Australia and China arising from financial payment terms that lessen the commercial risk to China Eastern of expanding capacity, more convenient timetabling of connecting flights and plans by the parties to significantly expand the range of destinations covered by their current codeshare arrangement if the alliance proceeds. Further, the authorisation was granted subject to the conditions that the aggregate capacity on routes between Australia and Shanghai continues to grow at 4% per year over the five years of the authorisation and that the carriers provide data to the ACCC regarding capacity, revenue and average fares on routes between Australia and China.
- Likelihood of lower prices as a result of the removal of double marginalisation.

Although the ACCC maintained that the alliance created the potential for significant public detriment arising from a loss of competitive tension on the Sydney – Shanghai route (Qantas and China Eastern currently have almost 85% of the capacity on that direct route), it concluded that this detriment was outweighed by the public benefits. In consequence, it granted authorisation for five years.

However, the ACCC indicated that its decision was not clear cut and the prospect of re-authorisation beyond the initial five year period would be heavily dependent upon the outcome of the authorisation (as evidenced by the data to be provided by the carriers to the ACCC over the term of the authorisation).

ACCC DECISIONS TO EXTEND AUTHORISATION FOR ALLIANCES

In August 2015, the ACCC issued a draft determination to re-authorise the alliance between Virgin and Delta in respect of routes between Australia and the United States for a further five years.

In October 2015, the ACCC issued a draft determination to re-authorise the alliance between Virgin Australia and Etihad Airways in respect of services between Australia and the Middle East for a further five years.

In November 2015, the ACCC issued a draft determination that would authorise to Qantas and American Airlines (AA) to continue to co-ordinate their operations on trans-Pacific routes for a further five years (half of the 10 year period sought by the carriers). This would extend, and also expand, the authorisation received in 2011 for a Joint Business Agreement (JBA) allowing co-ordination of their operations between Australia / New Zealand and US / Canada/Mexico. As the ACCC's final decision is not due until early 2016, and the parties wanted to introduce new services on the Sydney Los Angeles and Sydney San Francisco routes from December 2015, the carriers obtained interim authorisation for those services. More information on the interim authorisation is available at our earlier article here.

PLANS RELEASED FOR SECOND SYDNEY INTERNATIONAL AIRPORT

In October 2015, the Australian Government released an environmental impact statement and airport plan for the new international airport at Badgerys Creek in Western Sydney. The plan provides for a single 3,700 metre runway to facilitate forecast demand of 10 million passengers per year up to 2030 (with a second runway envisaged by approximately 2050). The plans do not currently provide for a rail link between the airport and Sydney, which could result in the airport being less popular with commuters than might otherwise be the case. The draft plan is available here.

RECOMMENDATION TO INCREASE CAPACITY RIGHTS AT MAJOR AUSTRALIAN AIRPORTS

In November 2015, the Productivity Commission released a research report regarding Barriers to Growth in Service Exports (PC Report) which recommended that the Australian Government renegotiate air services agreements to allow unrestricted access to airlines flying to and from Melbourne, Brisbane and Perth airports and, unless the costs outweigh the benefits, Sydney airport.

The PC Report observed that air services agreements were constraining international air services from some countries and that removing that constraint would encourage increased capacity and increased competition on those routes. The PC Report also observed that the Department of Infrastructure and Regional Development has prioritised renegotiation of air services agreements with some countries where capacity is already constrained by air services agreements including Fiji, Hong Kong and Qatar.

The timing of the renegotiation of air services agreements between sovereign states is difficult to predict. However, the PC Report provides an impetus for the Australian Government to progress capacity increases under air services agreements.

For further information on competition law in the aviation industry please contact:

Simon Uthmeyer
Partner
T +61 3 9274 5470
simon.uthmeyer@dlapiper.com

Alec White
Senior Associate
T +61 3 9274 5144
alec.white@dlapiper.com

www.dlapiper.com