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 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 summaries key competition cases in the aviation industry, to see further details on each case, please click 'Read More.'

ACCC challenges online pricing practices of airlines

In December 2014, the Federal Court heard proceedings instituted by the Australian Competition & Consumer Commission (ACCC) against Jetstar Airways Pty Ltd (Jetstar) and Virgin Australia Airlines Pty Ltd (Virgin) alleging that drip pricing approach used in their online sales system for airfares constituted misleading and deceptive conduct. Judgment in this matter will likely be handed down in the early part of 2015. We suggest carriers review their online airfare sales process in advance of the judgment. Read More

Agent / carrier communications found to be attempted price fixing

In March 2014, Flight Centre was fined $11m for attempted price fixing. The Court made two key findings. First, Flight Centre had attempted to reach an agreement with Singapore Airlines (SQ) to fix the price at which SQ sold tickets. Second, that SQ was in competition with its agent, Flight Centre such that the cartel provisions of the CCA could apply. Both Flight Centre and the ACCC have appealed the decisions. The appeals were heard by the Full Federal Court in November 2014. Judgment is expected in early 2015. We suggest that carriers review their dealings with agents to ensure compliance with the cartel provisions of the CCA. Read More

Extraterritoriality – Air Cargo Cartel not in a market in Australia

In *ACCC v Air New Zealand*, the Federal Court determined in October 2014 that an alleged air cargo cartel in respect of surcharges on flights from Hong Kong to Australia did not occur in a "market in Australia" and was therefore not subject to the *Trade Practices Act 1974* (Cth) (TPA). Read More

ACCC continues to authorise alliances between carriers

In January 2015, Virgin Australia and Delta sought an extension to the authorisation which allows them to co-ordinate their operations on routes between Australia and the United States. In December 2014, the ACCC granted interim authorisation to an alliance between Etihad and Alitalia in relation to international routes to or from Australia. Read More

Tigerair threatens declaration of airport services

In July 2014, Tigerair applied for declaration of a Domestic Terminal Service at Sydney Airport. Although Tigerair subsequently withdrew its application in August 2014, the episode demonstrates the continuing importance of the threat of declaration in negotiations between carriers and airports. Read More

Harper Review presents opportunity for high level change

The Harper Review of Australia's competition laws will conclude in 2015 with a final report. The draft report, published in September 2014, suggested some areas where competition in the aviation sector could be increased. The government response to the final report presents an opportunity for structural change in the industry. Read More

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ACCC CHALLENGES ONLINE PRICING PRACTICES OF AIRLINES

In December 2014, the Federal Court heard proceedings instituted by the ACCC against Jetstar Airways Pty Ltd (Jetstar) and Virgin Australia Airlines Pty Ltd (Virgin) alleging that drip pricing in relation to airfares constituted misleading and deceptive conduct.

Drip pricing is when a corporation adds incremental charges throughout the online booking process that were not included in the initial headline price.

For example, Jetstar imposed a booking and service fee of $8.50 per passenger if payment was made by credit card (other than a Jetstar branded credit card) or Paypal. The ACCC alleges that the substantial majority of bookings incurred the booking and services fee and that Jetstar engaged in misleading or deceptive conduct by not disclosing it either with, or as part of, the headline price.

There is presently no case law in Australia as to whether "drip pricing" constitutes misleading or deceptive conduct under the *Competition and Consumer Act 2010* (Cth).

In the recent case of *ACCC v TPG Internet* regarding advertisements that prominently displayed a price which was lower than the total price, the High Court observed that misleading or deceptive conduct may encompass conduct that merely attracts a consumer into a "marketing web." Specifically, the High Court stated that a contravention may occur:

> "not only when a contract has been concluded under the influence of a misleading advertisement, but also at the point where members of the target audience have been enticed into "the marketing web" by an erroneous belief engendered by an advertiser, even if the consumer may come to appreciate the true position before a transaction is concluded."

Judgment in this matter will likely be handed down in the early part of 2015.

We suggest carriers review their online airfare sales process in advance of the judgment in order that they are prepared for any changes that may be necessary or available following the judgment.

FLIGHT CENTRE FINED FOR PRICE FIXING WITH SINGAPORE AIRLINES

In March 2014, Flight Centre was fined $11m for attempted price fixing arising from findings that it attempted to enter into agreements with Singapore Airlines (SQ) (its principal) that contravened the price fixing provisions of the *Competition and Consumer Act 2010* (Cth) (Act). The Act prohibits price fixing between competitors. The Court concluded that SQ was in competition with Flight Centre for reasons including that SQ sold tickets direct to the public through its website.

The ACCC alleged that Flight Centre had attempted to enter into agreements with various airlines, including SQ, which contravened s45A of the CCA by virtue of being an attempted agreement between competitors to fix, control or maintain the gross fare at which SQ would sell tickets.

The relevant conduct occurred during a period in which SQ was offering fares direct to the public on its website at lower prices than those available to Flight Centre.

An example of the relevant conduct was an email sent by Flight Centre to SQ on 19 August 2005 which the Court found was an invitation from Flight Centre to SQ to agree that SQ would not sell transport services directly to the public below a specified gross fare.

The Court found that Flight Centre was guilty of attempted price fixing, observing that:

- Flight Centre was an agent for international air carriers including SQ.
- There was a market for distribution and booking services in respect of international air travel.
- Singapore Airlines competed in the market for the provision of those distribution and booking services (as did Flight Centre). This was because SQ could offer and book flights directly with travellers (i.e. it was not necessary to go through an agent).
- The attempted agreement would have had the effect of fixing the retail or distribution margin.

Both parties appealed. The appeals were heard by the Full Federal Court in November 2014 and judgment is expected in early 2015.

We suggest that carriers review their dealings with agents to ensure compliance with the cartel provisions of the CCA. This is particularly important given the significant penalties attached to those provisions.

EXTRATERRITORIALITY – AIR CARGO CARTEL NOT IN A MARKET IN AUSTRALIA

In *ACCC v Air New Zealand*, the Federal Court determined in October 2014 that an alleged air cargo cartel in respect of surcharges on flights from Hong Kong to Australia did not occur in a "market in Australia" and was therefore not subject to the *Trade Practices Act 1974* (Cth) (TPA).

In this matter, the ACCC alleged that international airlines had colluded to fix, among other things, the level of fuel surcharges imposed on air cargo transport services on routes from Hong Kong to cities in Australia. The Court found that to impose a surcharge on cargo services out of Hong Kong, it was necessary to obtain the approval of the Hong Kong Civil Aviation Department (HK CAD) and that international airlines, including Air New Zealand, had made joint applications to the HK CAD for approval of surcharges following industry meetings.

The TPA prohibited price fixing conduct in a market in Australia. As such, the definition of the 'market' was critical. The Court found that:

- the relevant product markets were for the transport of cargo by air from Hong Kong to particular ports in Australia (e.g. Sydney);
- the decision as to which air carrier to use was generally made by freight forwarders but was sometimes made by large importers or exporters, some of whom were located in Australia; and
- the customers of the airlines were principally freight forwarders but also included some large importers and exporters, some of whom were located in Australia.

Geographically, the Court concluded that the relevant markets were not markets in Australia. The Court observed that:

- a feature of transport markets is that the place where the customers may turn to choose between providers of the service may be different from the place where the sellers operate the service;
- part of the service was provided in Australia and there was competition between the carriers in respect of that part of the service;
- some of the customers were located in Australia, and the airlines tousled for the business of customers located in Australia. Furthermore, the subjective decision of a customer to switch from one airline to another may be made in Australia; and
- the geographic location of a market is the place where the decision to switch airlines is 'given effect' – that is, the place where possession of the cargo is physically handed to the airline (and therefore the place where each competing airline must have a presence). In this case therefore, the relevant markets in respect of air cargo transport services from Hong Kong were in Hong Kong.

In 2010, the TPA was replaced by the CCA which contains broad prohibitions against cartel conduct. The extraterritorial application of those provisions remains at large because the provisions are not expressly geographically limited in their application and there is virtually no case law that has considered these provisions. Specifically, the cartel provisions in the CCA do not contain any link to the "market in Australia" provision used by the Court in *ACCC v Air New Zealand*. Even though the CCA provisions differ from the old TPA, we consider that the cartel provisions should be interpreted as applying only to cartels having a sufficient nexus with Australia. In determining what nexus is required, we consider the decision in *ACCC v Air New Zealand* provides a useful starting point.

The ACCC lodged an appeal in December 2014 which is yet to be heard.

The case impacts the extent to which Australian competition legislation regulates conduct in ports outside Australia.

HARPER REVIEW PRESENTS OPPORTUNITY FOR HIGH LEVEL CHANGE

The Harper Review of Australia's competition policy will conclude in 2015 with a final report. The draft report, published in September 2014, suggested some areas where competition in the aviation sector could be increased. Specifically, the draft report observed that:

- there should be further reform in increase competition in jet fuel supply and the pricing structure for services provided by Airservices Australia; and
- airport services may in the future be subject to access regulation under Part IIIA of the CCA. Although no airport services are currently the subject of an access declaration under this legislation, the ability for carriers to seek declaration remains an important feature of the negotiating landscape. For example, Tigerair lodged an application in July 2014 for the declaration of a domestic terminal service at Sydney Airport. It subsequently withdrew that application in August 2014.

The government response to the final report presents an opportunity for structural change in the industry.

TIGERAIR THREATENS DECLARATION OF AIRPORT SERVICES

In July 2014, Tigerair applied for declaration of a Domestic Terminal Service at Sydney Airport. Although Tigerair subsequently withdrew its application in August 2014, the episode demonstrates the continuing importance of the threat of declaration in negotiations between carriers and airports.

Declaration of services at airports may occur under the access process set out in Part IIIA of the CCA. The process allows carriers who are seeking access to essential services at airports but are unable to reach commercial agreement to seek an arbitrated outcome from the ACCC.

There are currently no declared airport services. Airport services that have been declared in the past include:

- airside services including the use of runways, taxiways and parking aprons at Sydney Airport in the period 2005 to 2010, following application by Virgin Blue Airlines; and
- services associated with the freight and passenger aprons and hard stands used by ramp handlers to load and unload freight at Sydney airport in the period from 1997 to 2005, following application for declaration by Australian Cargo Terminal Operators.

The Harper Review observed in its Draft Report in September 2014 that airport services may in the future be subject to access regulation. Further information regarding the Harper Review is outlined on the previous page.

ACCC CONTINUES TO AUTHORISE ALLIANCES BETWEEN CARRIERS

Alliances continue to be a feature of the Australian air transport landscape.

In January 2015, Virgin Australia and Delta sought an extension to the authorisation which allows them to co-ordinate their operations on routes between Australia and the United States.

In December 2014, the ACCC granted interim authorisation to an alliance between Etihad and Alitalia in relation to international routes to or from Australia.

In 2013, the ACCC granted two significant authorisations. The first involved co-ordination between Qantas, Emirates, Jetstar and various subsidiaries of those carriers on a number of routes throughout Asia and the world. The second involved co-ordination between Virgin Australian and Air New Zealand in relation to international routes to or from Australia or New Zealand.

These authorisations continue the trend seen in 2011 and 2012 when the ACCC authorised multiple co-ordination agreements between carriers.