AUSTRALIAN COMPETITION LAW UPDATE FOR THE AVIATION INDUSTRY

AUGUST 2015

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

Appeal Court clarifies price fixing laws applicable to carrier agent discussions

On 31 July 2015, the Full Federal Court provided welcome clarification that a carrier and a travel agent are unlikely to be characterised as being in competition with each other for the purposes of the *Competition and Consumer Act 2010* (Cth) (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. **Read more**

Australian Competition and Consumer Commission (ACCC) decision on Qantas China Eastern alliance imminent

The ACCC has delayed its decision regarding the Qantas China Eastern alliance until 31 August 2015. The ACCC issued a draft decision to oppose the proposed alliance in March but has since received a number of submissions advocating the contrary view including from the Chinese ambassador to Australia and the Australian Department of Infrastructure and Regional Development. **Read more**

ACCC grants interim authorisation to extended Qantas American Airlines alliance

In July 2015, the ACCC granted interim authorisation to Qantas and American Airlines (AA) to introduce new services on the Sydney Los Angeles and Sydney San Francisco routes from December 2015. Qantas and AA received authorisation for a Joint Business Agreement (JBA) in 2011 and are now seeking to have an expanded JBA authorised for a further ten years. **Read more**

Contracting for construction and operation of second Sydney International Airport

The Australian Government is currently developing proposed terms for construction and operation of a new international airport at Badgerys Creek in Western Sydney. It anticipates having provided its proposed terms to Sydney Airport Group by early 2016. **Read more**

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 now anticipates publishing its response in September 2015. **Read more**

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APPEAL COURT CLARIFIES PRICE FIXING LAWS APPLICABLE TO CARRIER AGENT DISCUSSIONS

The Full Federal Court (Full Court) has provided welcome clarification 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.

The appeal was from a 2013 decision in which the Federal Court concluded that Flight Centre's attempt to reach agreement with and SQ as to the gross fare that SQ would sell tickets to travellers through its website constituted attempted price fixing in breach of the CCA (click here to see our February update).

In finding that Flight Centre (an agent) and SQ (its principal) were relevantly in competition with each other in the provision of distribution and booking services, that earlier decision created significant uncertainty because it suggested a very broad application of a number of provisions of the CCA which apply to agreements between competitors (including the cartel provisions). The decision was also difficult to reconcile with a separate Federal Court finding, also in 2013, that a bank was not relevantly in competition with a mortgage broker (such that their agreement to limit rebates provided by brokers to home buyers did not constitute price fixing) in *ACCC v ANZ*.

On appeal, the Full Court found Flight Centre was not relevantly in competition with SQ. The Full Court reached this conclusion for reasons including that:

- There existed a market for international passenger air travel services (in which SQ competed). Separately, travel agents (including Flight Centre) competed in the supply of travel advisory services.
- The identification of a separate market for distribution and booking services in the first instance decision was artificial and incorrect. Instead, the Full Court characterised booking services as a component of the broader market for international passenger air travel services.
- Although Flight Centre supplied international passenger air travel services, it did so only as an agent for airlines.

The Full Court thus concluded that Flight Centre and SQ were not relevantly in competition and therefore that an attempted agreement between them could not constitute a contravention of the price fixing prohibition.

The approach of the Full Court in Flight Centre is largely consistent with the approach of the Federal Court in *ACCC v ANZ* in which an appeal judgment handed down on the same day confirmed the original decision that a bank did not compete with a mortgage broker that sold loan products on its behalf.

For agreements between carriers and travel agents, the decision removes the uncertainty which had hung over such agreements since the first instance decision and confirms that they may specify the price for international air transport services.

The decision will also give carriers greater confidence as to the contractual conditions that may be included in agreements with online aggregators.

ACCC DECISION ON QANTAS CHINA EASTERN ALLIANCE IMMINENT

The ACCC has delayed its decision regarding the Qantas China Eastern alliance until 31 August 2015. The ACCC issued a draft decision to oppose the proposed alliance in March. The ACCC's draft decision concluded that the proposed alliance would result in significant public detriment as a result of a lessening of competition in respect of the route between Sydney and Shanghai.

Since that time, the ACCC has received a number of submissions advocating a contrary view including from the Chinese ambassador to Australia and the Australian Department of Infrastructure and Regional Development. The ACCC's decision is likely to provide significant insight into its approach to analysing the competition effects of alliances between international airlines.

ACCC GRANTS INTERIM AUTHORISATION TO EXTENDED QANTAS AMERICAN AIRLINES ALLIANCE

In July 2015, the ACCC granted interim authorisation to Qantas and American Airlines (AA) to introduce new services on the Sydney Los Angeles and Sydney San Francisco routes from December 2015. The interim authorisation will be effective if the ACCC has not reached a final decision by that time. Qantas and AA received authorisation in 2011 for a Joint Business Agreement (JBA) allowing co-ordination of their operations between Australia/New Zealand and US/Canada/Mexico. The parties are now seeking to have an expanded JBA authorised for a further ten years. The ACCC will issue its draft determination shortly.

CONTRACTING FOR CONSTRUCTION AND OPERATION OF SECOND SYDNEY INTERNATIONAL AIRPORT

The Australian Government is currently developing proposed terms for construction and operation of a new international airport at Badgerys Creek in Western Sydney. The airport is likely to open in around 2025, initially catering for about five million passengers per year. Sydney Airport Group, which has first rights of refusal in respect of the project, is expected to have received the Government's proposal by early 2016. The current phase follows a period of consultation during which the Australian Government met with Sydney Airport group on 65 occasions over nine months to discuss the project.

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.

The Australian Government has received submissions and now anticipates publishing its response in September 2015. The review may result in structural change in the aviation industry as a result of reform recommendations regarding the supply of jet fuel and the cost of air traffic control services. In addition, a number of legislative reforms are recommended including making the misuse of market power prohibition easier for the ACCC to use, streamlining the authorisation process that is commonly used by carriers in relation to co-ordination agreements and clarifying aspects of the cartel provisions, including their application to conduct occurring outside Australia.

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