DLA PIPER

MARCH 2016

AUSTRALIAN COMPETITION LAW

UPDATE FOR THE AVIATION INDUSTRY

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 summaries key competition cases and legislative change in the aviation industry, to see further details, please click 'Read More.'

High Court to hear ACCC appeal of Flight Centre decision regarding carrier agent discussions

On 11 March 2016, the High Court granted special leave to the ACCC to appeal the decision of the Full Federal Court in the Flight Centre case. The Full Court decided in July 2015 that Flight Centre had not engaged in attempted price fixing. It 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 hearing will likely occur around the middle of 2016. **Read more**

Extraterritoriality - ACCC appeal succeeds: Court finds air cargo cartel was in a market in Australia

On 21 March 2016, the Full Federal Court overturned the first instance decision as to whether an air cargo cartel occurred in a 'market in Australia'. In reaching this finding, the Full Court identified a number of reasons that the market was 'in Australia' including that the services were supplied in part in Australia and that shippers who, as a matter of economic reality were customers of the airlines, were located in Australia. **Read more**

Ban on excessive credit card surcharges

In February 2016, *the Competition and Consumer Act 2010* was amended by the inclusion of provisions that ban corporations from charging an excessive amount for processing payments. A number of carriers operating in Australia have historically imposed surcharges for credit card payments that allegedly exceeded the cost to those carriers of processing those payments. In consequence, all carriers will need to ensure that any surcharge imposed for paying by credit card, or by any other means, is not excessive. **Read more**

BARA pushing for greater competition in jet fuel supply

BARA announced in March 2016 that it would continue to work with Australia's international airports to seek greater access to on-airport jet fuel storage in order to facilitate greater competition for this input. BARA rates the competitive conditions for jet fuel in Sydney and Melbourne as poor, with only two effective suppliers, and Perth as very poor, with only one effective supplier. **Read more**

Airservices Australia freezes prices for a year

In March 2016, Airservices Australia (**AA**) withdrew the five year pricing proposal that it released in August 2015, proposing instead to freeze prices at their current level until 30 June 2017. The August 2015 proposal would have seen prices increase by 5.3% in the first year with a weighted average increase of 3.3% over the life of the agreement. **Read more**

What to do when the ACCC comes knocking

In February 2016, the ACCC listed its priority enforcement areas for 2016. Those areas again include cartels and anti-competitive agreements. The ACCC has extensive powers to investigate conduct where it has reason to believe such a contravention has occurred. Those powers include conducting 'dawn raids' requiring the attendance of employees at interviews and the production of documents. We recently published three articles setting out our recommended actions in the event that your company is investigated. These are available here: Read more.

HIGH COURT TO HEAR ACCC APPEAL OF FLIGHT CENTRE DECISION REGARDING CARRIER AGENT DISCUSSIONS

On 11 March 2016, the High Court granted special leave to the ACCC to appeal the decision of the Full Federal Court in the Flight Centre case. The hearing will likely occur around the middle of 2016.

The Full Court decided in July 2015 that Flight Centre had not engaged in attempted price fixing. It 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 High Court is thus likely to consider the relationship between carriers and travel agents and, specifically, whether carriers are relevantly in competition with travel agents in relation to the sale of airline tickets.

EXTRATERRITORIALITY - ACCC APPEAL SUCCESSFUL AS COURT FINDS AIR CARGO CARTEL WAS IN A MARKET IN AUSTRALIA

On 21 March 2016, the Full Federal Court overturned the first instance decision as to whether an air cargo cartel occurred in a 'market in Australia'.

By way of background, in October 2014, the Federal Court determined in *ACCC v Air New Zealand* 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**). That decision is summarised in our earlier article linked here.

In a 2:1 decision, the Full Court overturned the first instance decision, finding that the relevant conduct had occurred in a market in Australia. In reaching this finding, the Full Court identified a number of reasons that the market was 'in Australia' including that the services were supplied in part in Australia and that shippers who, as a matter of economic reality were customers of the airlines, were located in Australia.

The first instance judgment in Australia had concluded that apart from the 'market in Australia' issue, the conduct of the carriers, Air New Zealand Limited and P T Garuda Indonesia Ltd was in breach of the price fixing provisions of the TPA. A such, in the absence of a further appeal, those carriers are likely to receive a penalty to be determined by a Court. Those carriers will now consider whether to appeal the matter further.

The price fixing prohibitions in the *Competition and Consumer Act 2010* (**CCA**) have been amended since the conduct the subject of this proceeding such that this case has limited direct precedential value. However, there remains a question as to whether, under the new cartel provisions in the CCA, it is necessary that there be any nexus between the anti-competitive conduct and Australia. If and when that issue arises, this case will likely be of relevance.

The position in Australia has followed the opposite path to Europe, where in December 2015 the General Court accepted the appeal of 20 carriers and annulled the initial judgment of the European Commission to fine those carriers.

BAN ON EXCESSIVE CREDIT CARD SURCHARGES

In February 2016, the *Competition and Consumer Act 2010* was amended by the inclusion of provisions that ban corporations from charging an excessive amount for processing payments. A number of carriers operating in Australia have historically imposed surcharges for credit card payments that allegedly exceeded the cost to those carriers of processing those payments. In consequence, all carriers will need to ensure that any surcharge imposed for paying by credit card, or by any other means, is not excessive.

Whether a charge is excessive will be determined by reference to a standard to be published by the Reserve Bank of Australia (**RBA**). The draft standards which were published in a Consultation Paper in December 2015 proposed a standard under which a merchants could impose surcharges up to the average cost of acceptance over a 12 month period. The cost of acceptance is defined more narrowly than the existing 'reasonable cost of acceptance' standard and includes only the following four costs:

- merchant service fees in respect of the relevant payment scheme;
- fees for the rental and maintenance of payment card terminals;
- fees incurred in processing the relevant transactions; and
- other fixed fees for providing payment acquiring equipment and services referable to the relevant payment scheme.

To facilitate greater transparency, and enforcement, credit card issuers will be required to provide at regular (at least quarterly) statements to merchants setting out the cost of acceptance over that period.

The prohibition will not take effect until the date set out in the final RBA standards document.

BARA PUSHING FOR GREATER COMPETITION IN JET FUEL SUPPLY

BARA announced in March 2016 that it would continue to work with Australia's international airports to seek greater access to on-airport jet fuel storage in order to facilitate greater competition for this input. BARA rates the competitive conditions for jet fuel in Sydney and Melbourne as poor, with only two effective suppliers, and Perth as very poor, with only one effective supplier.

The Harper Review of Competition Policy in Australia, released in March 2015 (Harper Review), expressed the view that competition in jet fuel supply should be a focus for further reform but did not make a formal policy recommendation. In consequence the Government response, published in November 2015, did not expressly refer to this issue. Nevertheless, the view expressed in the Harper Report provides an opportunity for stakeholders to seek reform in this area.

In February 2016, Mobil Oil announced plans to construct a new 2.7km pipeline linking its Yarraville fuel distribution terminal to an existing pipeline to Melbourne airport. Construction is likely to be complete by early 2017. Although this may assist to reduce supply constraints (there were 2 black traffic light incidents in 2015), it will not address the relatively low level of competition.

AIRSERVICES AUSTRALIA FREEZES PRICES FOR A YEAR

In March 2016, Airservices Australia (**AA**) withdrew the five year pricing proposal that it released in August 2015, proposing instead to freeze prices at their current level until 30 June 2017. The current pricing agreement between AA and carriers is due to expire in June 2016. The August 2015 proposal would have seen prices increase by 5.3% in the first year with a weighted average increase of 3.3% over the life of the agreement.

This revised proposal is made against the background of the Harper Review and expressed the view that the pricing structure for services provided by AA should be the focus of further reform. Although the Government response to the Harper Review did not expressly address this issue, the view expressed in the Harper Review provides an opportunity for stakeholders to seek reform in

this area. AA's decision to freeze prices may represent an acknowledgement of the concern within the industry.

MORE INFORMATION

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