

REGULATORY SCRUTINY OF AUSTRALIAN AVIATION INDUSTRY TAKES OFF

Shortly after the Australian Competition and Consumer Commission's (ACCC) three-year domestic airline monitoring program ended in June 2023, the Federal Government made a controversial decision in July 2023 to block an application made by Qatar Airways to increase its landing slots at airports in Australia. This decision has been criticised as anti-competitive and prompted a Senate Inquiry which further exposed practices in the aviation industry in Australia, calling for regulatory reforms.

The Senate's key recommendations for the Federal Government include not only a review of the Qatar Airways decision, but also the re-instatement of the ACCC's domestic airline monitoring program, the review of Sydney Airport's slot allocation system and the implementation of adequate consumer protection reforms. Deriving from this politically charged saga is a momentum to address the competition issues and reform Australia's aviation industry.

On 18 October 2023, in line with Senate's recommendation, Treasurer Jim Chalmers reinstated the ACCC's mandate to monitor Australia's air passenger services to commence by the end of the year. Importantly, publication of the Aviation Green Paper marks a significant stage in setting the policy direction for the domestic aviation sector and industry participants should use the process to make submissions by 30 November 2023.

FINAL CALL ON DOMESTIC AIRLINE MONITORING PROGRAM

Following discontinuation of Federal Government funding, the ACCC ended its domestic airline monitoring program after issuing its twelfth and final report in June 2023 (ACCC Report). The ACCC Report concludes that domestic airline

Key issues

- The ACCC's final June 2023 report on domestic airline monitoring concludes that the lack of effective competition in Australia's domestic airline industry has resulted in higher airfare prices and poorer customer service.
- The Federal Government's controversial decision to reject Qatar Airways' bid for extra flights to Australia has further compounded and exacerbated the lack of competition in the sector.
- Former ACCC chair, Rod Sims, criticised the "anti-competitive" Qatar Airways decision, Qantas' and Virgin's shareholdings in ACA and their alleged "slot-hoarding" at Sydney Airport.
- The ACCC has urged the Government to review the slot allocation process, indicating that legislative reform to the airport's management scheme is needed to materially improve domestic airline competition.
- Senate's key recommendations published on 9 October 2023 call for the Federal Government to review the Qatar Airways decision, re-instate the ACCC's domestic airline monitoring program, review the slot allocation system at Sydney Airport and implement consumer protection reforms to address significant delays, cancellations and lost baggage.
- Publication of the Aviation Green Paper marks a significant stage in setting the policy direction for the aviation sector, and industry participants should use the process to make submissions.

competition in Australia is at a "*critical juncture*" and that the lack of effective competition has resulted in higher fares and poorer customer service for Australians. The ACCC Report highlights the need for competition law reforms in the aviation industry, in particular changes to the legislative scheme that allocates domestic take-off and landing slots at Sydney Airport. The ACCC's current chair, Gina Cass-Gottlieb, commented on the ACCC Report, noting that access to peak time slots at Sydney Airport is critical for new and expanding airlines to build their networks, and unless there is legislative reform to the airport's demand management scheme, there will be no material improvement in domestic airline competition in Australia in the foreseeable future.

Although the Bureau of Infrastructure, Transport and Regional Economics will continue to publish a monthly domestic airfare index, industry players, including the Australian Airports Association, Bonza the newest player in the domestic airline industry, and regional carrier Rex, expressed their disappointment and concern about the end of monitoring, given the economic climate, cost of fares and airline profitability. The reaction is unsurprising, considering that the Australian domestic aviation sector, a key contributor to the country's economy, is one of the most concentrated industries, barring only natural monopolies such as electricity grids and rail networks. Over the last two decades, Qantas and Virgin Australia (**Virgin**) have been an effective duopoly, controlling 94% of the sector as of April 2023. Whilst the ACCC acknowledged that Rex's expansion into major intercity routes and Bonza's launch have been positive developments for competition, their respective shares of domestic flights remain limited. In addition, airlines wanting to enter or expand at scale face a combination of barriers, including incumbency advantages, the need to establish a reputation for providing a reliable service, access to and training of air crew and engineers, access to suitable aircraft and infrastructure, and significant regulatory requirements.

QANTAS CONTROVERSIES

The ACCC's three-year monitoring and reporting role ended at a turbulent time for the Australian airline industry. On 31 August 2023, the ACCC launched Federal Court action against Qantas, alleging that the national carrier engaged in misleading and deceptive conduct in relation to advertising and selling tickets for flights that it had already cancelled in its system. The allegations prompted Qantas to scrap a self-mandated December 2023 expiry date to refund \$570 million COVID-19 flight credits but has indicated that it will defend the proceedings brought against it.

Although not competition related, the High Court recently held that Qantas illegally outsourced 1,700 ground handler jobs during pandemic, exposing the airline to up to \$200 million in damages.

These controversies have not only damaged Qantas' reputation but exposed problematic industry practices, which quickly became a hot topic of national debate, with politicians and industry players calling for increased regulatory scrutiny and reform.

SENATE INQUIRY

Adding fuel to the national debate over airline practices, in July 2023 the Federal Government decided to block an application made by Qatar Airways to double its capacity in Australia by adding 28 flights a week into Sydney, Melbourne and Brisbane amid 50% higher prices than pre-pandemic levels. This decision, which has proven controversial with the Australian public and competition heavyweights, has prompted a Senate Inquiry. Qantas and Virgin

have each been scrutinised in the probe which investigated all Federal Government decisions relating to Commonwealth bilateral air service agreements in the past 12 months.

When questioned in the course of the Inquiry about the possibility of renewing the domestic airline monitoring program, Qantas' new CEO Vanessa Hudson stated that she did not believe separate monitoring was necessary given the ACCC's existing powers, despite calls from politicians and industry participants for the Federal Government to restore funding. Qantas is the only aviation industry player opposed to renewing the monitoring program, with Virgin, Bonza and the Australian Airports Association all expressing their support during the Inquiry. Ms Cass-Gottlieb noted that the ACCC sees "a case" for a fresh mandate from the Federal Government to monitor competition, prices and aviation industry practices, and to help new entrants compete with established players Qantas and Virgin.

Speaking to the Senate, former ACCC chair Rod Sims, expressed the view that the Australian aviation sector had been subject to "*poor public policy for too long*". Mr Sims said that by blocking Qatar Airways' bid to fly more to major capital cities, the Federal Government effectively gave Qantas a competitive advantage, as the additional flights "*would almost immediately reduce airfares in the middle of a cost-of-living crisis*."

In addition to international airline access, Mr Sims criticised Qantas' and Virgin's shareholdings in Airport Coordination Australia (**ACA**). ACA was appointed by the Federal Government in 1997 to manage slots at Australia's busiest airports, including Sydney. Throughout the years, ACA's board consisted of members representing Qantas and Virgin. Although ACA re-tenders for its contract approximately every three years, during its nearly 17-year tenure ACA has not to date been replaced by a competitor. Addressing the Senate, ACA's chief executive Petra Popovac denied any suggestion of influence by the national carriers, noting that ACA was "*completely independent*" when allocating slots to airlines, despite being mostly owned by Qantas and Virgin. Mr Sims echoed Ms Cass-Gottlieb's views that the Federal Government must take a closer look at how airport slots are allocated, noting that smaller players such as Rex and Bonza have struggled to secure landing slots.

Qantas submitted to the Inquiry that "*while it deviates in some respects, the Sydney Airport Demand Management Scheme is based on international principles consistent with the Worldwide Airport Slot Guidelines (WASG)*." Qantas also argued that Sydney Airport is not full, as only 75% of available slots are allocated, noting that in both 2023 scheduling seasons, Rex has been awarded the majority of slots that it has sought, including in peak periods.

The Inquiry has revealed that the Qatar Civil Aviation Authority applied for a review of the Federal Government's decision to deny Qatar Airways additional slots. That application was made on 16 August 2023. Qantas has urged the Federal Government not to review the decision.

SENATE RECOMMENDATIONS

On 9 October 2023, the Inquiry published its report, outlining Senate's key recommendations for the Federal Government (**Senate Report**), including to:

- Immediately review the Qatar Airways decision;
- Urgently reinstate the ACCC's domestic airline industry monitoring program;

- Consider cost-benefit analysis, consult widely with stakeholders, including the ACCC, and publish its reasons when making decisions relating to bilateral air services agreements;
- Review reform options to strengthen competition in the domestic aviation industry, including potential divestiture powers to remedy any misuse of market power;
- Direct the ACCC to conduct an inquiry into potential anti-competitive behaviour in the domestic aviation market;
- Develop and implement consumer protection reforms as soon as reasonably practicable to address significant delays, cancellations, lost baggage and devaluation of loyalty programs;
- Urgently respond to the Review of the Sydney Airport Demand Management Scheme, including the 2021 Harris Review recommendations to improve airport slot management and strengthen the "use it or lose it" rule; and
- Consider introducing limited cabotage for foreign airlines to regional airports.

The Senate committee has also recommended its own extension to November to receive evidence from Qantas' former CEO Alan Joyce who declined to appear and re-examine other Qantas representatives who provided "unsatisfactory" responses. However, Coalition motion to reconvene the committee failed after the Greens and independent Senator David Pocock sided with Labor. This means Mr Joyce will not be summoned to appear before the Inquiry.

The Senate Report has further demonstrated how politically charged the saga has become. While senators agreed on a range of recommendations aimed at addressing problematic industry practices and stamping out anti-competitive behaviour by larger airlines, Labor called the Inquiry a "*political stunt*" in a dissenting report.

MOMENTUM FOR REFORM

Notwithstanding the current lack of Government action in this space, there appears to be public and political momentum to address the competition issues uncovered during the Inquiry and reform Australia's aviation industry in line with Senate's recommendations.

On 18 October 2023, Treasurer Jim Chalmers reinstated the ACCC's mandate to monitor Australia's air passenger services. The direction will apply for three years and commence before the end of the year with reports released quarterly. Key areas will include the level of capacity the airlines are putting on each route as well as industry performance, including on cancellations and delays.

The Aviation Green Paper (**Green Paper**) published on 7 September 2023 marks an important step in developing the Aviation White Paper which will set the policy direction for the aviation sector out to 2050, set to be released mid-2024. The Green Paper addresses capacity constraints at Sydney Airport during peak times and the controversial issue of "slot hoarding", noting that the Federal Government is considering the 2021 Harris Review recommendations paper in relation to the Sydney Airport Demand Management Scheme (**Scheme**). Without providing much detail, the Green Paper also states that

the Federal Government has recently concluded targeted consultation regarding potential changes to the Scheme, *"with a particular eye to modernising the slot allocation framework and strengthening compliance measures to ensure that slots are not being misused by airlines."*

Industry participants, in particular those concerned about slot allocation at Sydney Airport, should use the Green Paper process to make submissions by 30 November 2023.

CONTACTS



Elizabeth Richmond
Partner

T +61 2 8947 8325
E elizabeth.richmond
@cliffordchance.com



Damian Bachor
Associate

T +61 2 8922 8079
E damian.bachor
@cliffordchance.com



Mark Grime
Counsel

T +61 2 8922 8072
E mark.grime
@cliffordchance.com



Angel Fu
Senior Associate

T +61 2 8922 8089
E angel.fu
@cliffordchance.com



Sam Frouhar
Associate

T +61 2 8922 8053
E sam.frouhar
@cliffordchance.com

This publication does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice.

www.cliffordchance.com

Clifford Chance, Level 24, 10 Carrington Street,

Sydney, NSW 2000, Australia

© Clifford Chance 2023

Liability limited by a scheme approved under professional standards legislation

We use the word 'partner' to refer to a member of Clifford Chance LLP, or an employee or consultant with equivalent standing and qualifications

Abu Dhabi • Amsterdam • Barcelona • Beijing • Brussels • Bucharest • Casablanca • Delhi • Dubai • Düsseldorf • Frankfurt • Hong Kong • Houston • Istanbul • London • Luxembourg • Madrid • Milan • Munich • Newcastle • New York • Paris • Perth • Prague • Riyadh • Rome • São Paulo • Shanghai • Singapore • Sydney • Tokyo • Warsaw • Washington, D.C.

AS&H Clifford Chance, a joint venture entered into by Clifford Chance LLP.

Clifford Chance has a best friends relationship with Redcliffe Partners in Ukraine.