High Court confirms offshore reach of 'market in Australia'

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In brief

The High Court of Australia (**High Court**) has unanimously dismissed appeals by Air New Zealand and PT Garuda Indonesia Ltd (**the airlines**) from the Full Federal Court's decision which had found that the air cargo services of the airlines from Hong Kong, Singapore and Indonesia to Australia were supplied in a market 'in Australia'. This recognition of a market in Australia effectively exposed the conduct of the airlines to the price fixing regime under the former *Trade Practices Act 1974 (Cth)* (**TPA**).
The High Court has recognised a broader set of factors to consider when determining whether the alleged contravening conduct occurred in a market 'in Australia', being:

- where there is independent rivalry between market participants, either wholly or partly in Australia;
- the nature of the services and where services are unidirectional and route-specific to Australia;
- the understandings between vendors in relation to customers in Australia;
- whether vendors act alone or with other vendors in relation to customers in Australia;
- promotion of services through targeted sales and marketing strategies; and
- specific demand for services from Australia and the response by vendors to this demand.

Whilst this case examined the price fixing provisions under the old TPA, it is likely to have implications for the cartel offences in the *Competition and Consumer Act 2010 (Cth)* (**CCA**). While the new cartel offences are not focused on whether goods or services are supplied or acquired in a market 'in Australia', the case has implications for how the High Court will interpret the competition condition under the new cartel regime. The High Court decision sends a clear warning to multinational companies to appreciate that any anticompetitive arrangements entered into overseas may still be found to have occurred in a market 'in Australia', particularly where the ultimate consumers of the services tainted by the conduct are in Australia. This case serves as another victory for the ACCC in its crackdown on cartel conduct (especially in the airline industry), as outlined in our earlier publication, ACCC's compliance and enforcement priorities for 2017, and could broaden the scope of competition recognised under the CCA.

In detail

History and background of the long-running battle

In March 2016, on appeal to the Full Federal Court, the ACCC successfully argued that the airlines cooperated and fixed fuel and insurance surcharges on the carriage of cargo from Hong Kong, Singapore

and Indonesia to destination ports in Australia, in contravention of sections 45 and 45A of the former TPA.

The Full Federal Court focused on the key issue of whether the airlines' conduct had, or was likely to have, an impact of substantially lessening competition in a market for goods and services in Australia. The Full Court by a 2-1 majority found that the market definition for goods and services must be interpreted in a broad manner and that the price fixing conduct occurred in a market 'in Australia' from the point of shipment onwards. The majority applied a two-fold market test comprising of a relevant market identification and analysis of the entire market rather than geographical dimensions alone.

Factors considered by the High Court

In the High Court's unanimous view, there was a relevant market in Australia for the airlines' air cargo services, and the appeals of the airlines were dismissed. It was deemed that a market in Australia, according to the statutory provisions, referred to the fixing of prices in any market in Australia in which the companies competed to supply services. Chief Justice Kiefel, Justice Bell and Justice Keane (**Kiefel, Bell and Keane**) issued a joint judgement. Justice Gordon (**Gordon**) and Justice Nettle (**Nettle**) issued individual and separate judgements, although all five judges stated that they agreed with, and adopted, the extensive reasoning and summary provided by Gordon J in her Honour's individual judgement.

Market definition and statutory framework

The High Court affirmed the Federal Court's principle outlined in *Australian Competition and Consumer Commission v ANZ Banking Group*[1] and stated that the market definition process required identification of the contravening conduct, consideration of the interactions between, and perceptions of, all relevant actors and participants in the commercial community involved, and consideration of the statutory terms governing the conduct. Gordon J believed that it was the flow-on effect for consumers and not the effect on other competitors that should be considered when identifying the market.[2]

The relevant facts considered included that the airlines flew freight to ports in Australia which involved transporting cargo from an origin port to a destination port, ground handling services at both origin and destination ports, inquiry services for tracking delays and lost shipments, and dealing with damaged cargo issues at destination ports. The services were acquired by freight forwarders or shippers as a single package or suite of services. The airlines obtained the cargo from freight forwarders at an origin airport, and the service of taking possession of the cargo at the port of origin, in order to fly it to a destination port in Australia, was an act that could only be performed at the origin port. Although freight forwarders directly entered into contracts with airlines in origin ports such as Hong Kong and other jurisdictions, the High Court was of the view that main importers and shippers in Australia had the ability to influence and direct the decision as to which airline should be used in some cases, and airlines would compete for cargo directly from those large shippers. The presence of this rivalry in a destination port in Australia pointed to competition in that location, and therefore a market 'in Australia'.

The High Court referred to the following factual characteristics to confirm the proposition that the airlines were in competition in a market, and that market was 'in Australia', even though the market was also in another country (geographical characteristics were not sufficient alone to prove that the market was in Australia):

- Economically significant demand from multiple markets including a market in Australia.
- Physical negotiations and partnering with relevant consumers and targets that were shipping or forwarding freight to consumers in Australia.
- Marketing in cargo magazines and sales targeting strategies which showed that the shippers in Australia were 'objects to be pursued'.
- Product design specifications designed to pursue customers in Australia.

[1] (2015) 236 FCR 78 at 108 [138].
[2] Gordon J at 68.

Whether substitutability of a product could be an indicator of competition in a relevant market

The trial judge had earlier concluded that the substitutability of products occurred primarily in the foreign jurisdictions, and therefore that the relevant competitive behaviour occurred in those jurisdictions and not in Australia. However, the High Court noted that while this argument was persuasive and not unimportant, and could have ultimately been a decisive factor in a market definition,[3] the location of substitutability and where a contract is entered into was not conclusive for defining the market.[4] Kiefel, Bell and Keane JJ, with whom Nettle and Gordon JJ agreed, stated that although execution of contracts for supply of services could occur in origin ports overseas, the location where contracts may be switched or substituted between service providers should not be the sole indicator to prove that the market was in a foreign or Australian market. Kiefel, Bell and Keane JJ mentioned that the contravening conduct of the airlines and its range of effects required consideration. The High Court concluded that:

> *The airlines were actively engaged in attempting to capture the demand for services emanating from shippers in Australia as an integral part of their business. The airlines' deliberate and rivalrous pursuit of orders emanating from Australian shippers was compelling evidence that they were in competition with each other in a market that was in Australia.*[5]

The High Court confirmed that the use of a range of techniques, that included targeted marketing and sales strategies to try and compete for the demand of shippers requiring a destination port in Australia, met the definition of rivalrous behaviour and therefore the essence of competition in that specific market.

The airlines' submissions that were dismissed in the High Court

Inflexible aspects of the market

In support of its appeal, Air New Zealand submitted that all sources of its supply were located at the port of origin and substitution could only occur in those origin port jurisdictions. Garuda submitted that demand for delivery services was met by freight forwarders and these parties were considered to be the consumers and not the shippers located in Australia. The High Court did not find these arguments to be determinative, as they did not accurately or realistically describe the actual interactions, perceptions and actions among the relevant actors and participants in the alleged market or commercial community, as established in the case of *ANZ Banking Group*[6] and affirmed by the High Court in the current case.

Foreign state compulsion to impose surcharges

The airlines also submitted that they were compelled by foreign law to engage in the impugned conduct, and were therefore not engaging in conduct to lessen competition. They argued that to establish a contravention of the TPA, there needed to be evidence that the airlines chose to engage in such conduct. They submitted that the airlines had no choice but to charge a fuel surcharge. The trial judge, Full Federal Court and High Court all confirmed that neither foreign law nor foreign practice compelled the airlines to impose a fuel surcharge - the foreign law merely required the airlines to not to impose a surcharge at all or to seek approval from the Hong Kong Civil Aviation Department for the surcharge. It was deemed that the airlines sought relevant approval for the surcharge devised, applied the surcharge, and the Hong Kong regulations did not impose any requirement to compulsorily charge this fee.

Alleged inconsistency in laws

Garuda submitted that the fuel surcharges on transport of air cargo were a tariff within the meaning of the Australia-Indonesia Air Services Agreement (**ASA**) of 1969 and the *Air Navigation Act* 1920 *(Cth)* (**ANA**). It was also submitted that the TPA could not apply to the ASA, as the ANA and prohibitions in the TPA on prices and competitors were inconsistent both practically and operatively. The High Court found that the alleged inconsistency did not exist and that Article 6 of the ASA required a setting of minimum tariffs and not imposition of fixed tariffs. It further stated that the actions of Garuda and other airlines in

[3] Kiefel CJ, Bell J, Keane J at 26.
[4] Kiefel CJ, Bell J, Keane J at 29.
[5] Kiefel CJ, Bell J, Keane J at 34.
[6] (2015) 236 FCR 78 at 108.

specifically meeting in Hong Kong and Indonesia to fix and charge fuel and other surcharges were independent of any minimum requirements imposed by an ASA.

Implications

The High Court decision confirms that a relevant market cannot be identified or defined in a vacuum. The place of destination in the supply of goods or services is likely to be considered in order to determine the overall interactions between, perceptions and actions of, the actors and participants within the commercial community. In particular, where there is unidirectional transportation of goods or services from one location to another as part of a service provided, the place where the contract was signed or the place where goods or services can be substituted are unlikely to be the only indicators for identifying whether the market was overseas or 'in Australia'.

Further, economically significant demand from a particular destination location may be persuasive but will not be the sole market identifier. Businesses should be aware of the significance of where meetings are held, negotiations and business partnerships entered into, targeted marketing or sales strategies, and product design tailored towards specific customer needs, as these can cumulatively assist to establish the relevant market in respect of which the conduct occurred. As such, multinational corporations should be aware of the extensive ambit of the 'market' definition.

The High Court's decision will remain relevant, even if the current legislation is amended by the Competition and Consumer Amendment (Competition Policy Review) Bill 2017 (which is currently before Parliament). This Bill (if passed) will add a note to section 44ZZRD(4) to specify that 'trade or commerce' in section 4 means trade or commerce within Australia or between Australia and places outside Australia. The High Court's decision effectively anticipates this proposed legislative clarification by recognising a market the outer geographical dimensions of which includes places outside Australia.

The case has been remitted back to the Federal Court to determine relief (including penalty).

The takeaway

The ACCC's win in the High Court reflects an effective prosecution trend by competition regulators worldwide against global and domestic cartels. In particular, the High Court has confirmed a broadened approach to market definition. It enlarges the geographic dimension of markets and expands the reach of competition laws into other jurisdictions. It is a warning to businesses that their conduct overseas (including the entry into contracts) could fall within the Australian competition framework's reach, especially where the conduct impacts Australian consumers. It is increasingly important for businesses to recognise and define the markets they operate in, take effective measures to deter cartel conduct by their branches and operations that may have an impact on Australian consumers, seek ACCC approval for any proposed conduct or arrangements if there is uncertainty on implications, consider a legal review of current agreements and supply chains for compliance with the CCA, seek legal advice for the structuring of proposed agreements, and avoid price fixing conduct by any means.

Let's talk

For a deeper discussion of how these issues might affect your business, please contact:

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