
Flight Centre's successful appeal restores the legitimacy of agency distribution models

6 August 2015

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In brief

Flight Centre has successfully appealed against the original trial judge's decision which had earlier found that it attempted to induce anti-competitive price-fixing arrangements with three international airlines. The Full Court of the Federal Court held that Flight Centre's conduct did not constitute price fixing on the basis that:

- Flight Centre and the airlines were found not to be in competition with each other in the relevant market of supplying international passenger air travel services, and
- Flight Centre acted as agent for the airlines and was incentivised to secure business for the airlines' supply of international passenger air travel services to customers.

In a separate judgment, the Full Court also dismissed the ACCC's appeal in the ANZ case, finding that the trial judge was correct in holding ANZ Bank did not compete with independent mortgage brokers, and therefore was not engaged in price-fixing as alleged by the ACCC.

Clients using agency distribution models for distributing goods and services to consumers should continue to seek relevant advice to be satisfied that the agency relationship will avoid the parties being taken to be in competition with each other in the relevant market, otherwise their arrangements may be examined under the *Competition and Consumer Act 2010*.

In detail

The Full Court of the Federal Court of Australia has unanimously allowed the appeal by Flight Centre Travel Group Limited (Flight Centre) against the trial judge's earlier decision which found Flight Centre attempted to induce anti-competitive price-fixing arrangements with three international airlines.

At first instance, the ACCC had successfully alleged that Flight Centre attempted to induce Singapore Airlines, Malaysia Airlines and Emirates to make a contract or arrangement, or arrive at an understanding

with Flight Centre containing a provision that the airfare offered by the airlines directly to customers would not be priced less than the net fare that the airlines made available to Flight Centre, plus Flight Centre's commission. In doing so, the trial judge found this provision had the purpose or effect of substantially lessening competition, and deemed price-fixing under the old s45A of the *Trade Practices Act 1974* (Act) (Note: Price-fixing is now a per se cartel offence under the *Competition and Consumer Act 2010*).

Flight Centre's appeal can be summarised as follows:

- The trial judge erred in finding that Flight Centre relevantly competed with the three airlines for the purposes of s45A;
- The trial judge erred in finding that there existed a market for distribution and booking services, and that Flight Centre and the airlines supplied such services in competition with each other in that market;
- The trial judge erred in finding that Flight Centre's attempt to retain its margin/commission and insist that the fares offered by the airlines directly to customers would not be priced less than what the airlines offered to Flight Centre, was a provision for the purposes or effect of fixing, controlling or maintaining prices for the supply of distribution and booking services; and
- The \$11 million pecuniary penalty was manifestly excessive.

Flight Centre's appeal centred around the proper characterisation of the services supplied by airlines and travel agents when an international flight (ie. international passenger air travel services) is sold or supplied to a customer, either directly by the airline or through the airline's agent. The definition of the relevant market is used to determine whether a provision of a contract, arrangement or understanding between Flight Centre and the airlines had the purpose or effect of substantially lessening competition for the purposes of s45 of the Act, and the deeming provision in respect of price-fixing in s45A of the Act.

In allowing Flight Centre's appeal, the Full Court found the trial judge had erred in defining the relevant market as a separate market for "booking and distribution services to consumers". Flight Centre and the airlines were not in competition with each other in respect of any of the relevant services required to satisfy the price fixing provisions of the old *Trade Practices Act*. The Full Court found the airlines did not supply distribution services to themselves in competition with Flight Centre, and Flight Centre did not supply any booking services to consumers in competition with those airlines. There was no market for distribution and booking services in respect of international air travel which Flight Centre and the 3 airlines competed.

Rather, the booking and ticketing services provided by Flight Centre (as an agent for the international airlines, pursuant to a Passenger Sales Agency Agreement to which Flight Centre and the International Airline Transport Association (on behalf of its members which included the three airlines) were parties to) were an ancillary part of the supply of the international passenger air travel.

Accordingly, there was no relevant competition between Flight Centre and the airlines for the purposes of s45 and 45A of the Act. The Full Court recognised that there was a rivalry or competition that existed between Flight Centre and the airlines in respect of the supply of international passenger air travel services, as travel agents, such as Flight Centre, would want to sell as many flights as they could to earn a commission. Flight Centre operated in the market for international passenger air travel services, only as

an agent for the airlines. However, that rivalry or competition was in respect to the supply of international passenger air travel services to consumers and not the supply of distribution services to the airlines or booking services to consumers. The trial judge therefore erred in finding that the relevant competition existed by transferring the competition which he found in a broad sense in the market for the supply of international passenger air travel services into a non-existent market for booking and distribution services to consumers.

Flight Centre was therefore successful in its appeal. The Full Court set aside the order that Flight Centre pay the civil penalty of \$11 million and dismissed the ACCC's cross-appeal in relation to the size of the original penalty order. The ACCC has been ordered to pay Flight Centre's costs of the original hearing and the appeal.

ANZ appeal

In a separate judgement, the Full Court also dismissed the ACCC's appeal in the Australia and New Zealand Banking Group Ltd case, finding the trial judge was correct in holding ANZ Bank did not compete with independent mortgage brokers that distributed ANZ home loans and therefore was not engaged in price-fixing as alleged by the ACCC.

In essence, the Full Court found that the provision of advice and assistance to customers in obtaining a loan (whether undertaken by the ANZ Bank or its brokers) was an integral part of the supply of the loan itself, rather than the provision of services in a separate market. An interesting dimension of this case was that the ANZ Bank was not in an agency relationship with the mortgage brokers.

The takeaway

These recent Full Court decisions would be welcomed in the business community, as this restores some clarity as to how the competition laws should regulate the pricing practices adopted within agency and broker models used for distributing goods and services to consumers.

It should be noted that the Full Court at [163] emphasised that the existence of an agency relationship does not always mean the parties could not be in competition with each other for the purposes of Part IV of the Act, but that each case requires examination of its own facts. If the commercial relationship was to the effect that an "agent" was in fact no more than a distributor or reseller of the other party's goods or services, there may be competition between the parties, in which case the Part IV provisions of the Act would need to be carefully considered in respect of the proposed arrangements.

Let's talk

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

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